

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1971

**No. 70-2**

UNITED STATES OF AMERICA,

*Appellant,*

—v.—

TWELVE 200 FEET REELS OF SUPER 8 MM. FILM, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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## RELEVANT DOCKET ENTRIES

70-765-IH

USA

vs

12 200 Ft REELS OF SUPER 8 MM FILM ETC

## DOCKET ENTRIES

DATE	PROCEEDINGS
4/ 9/70	Fld Complt for forfeiture—seizure of obscene films —Bur of Customs. Fld prae for & issd W/A. Md JS-5.
4/24/70	Fld W/A retd exec. Fld prae for and issd alias W/A. 8 Film
4/27/70	Fld ord dismissing action & that U.S. Marshal return deft material to importer. (Ent 4/27/70) JS-6
4/27/70	Fld Plt's NOTICE OF APPEAL, with service thereon; Fld Exparte motn for Ord staying execution of Ord of dismissal; Fld Affid of Ariel G. Paladini; Fld Ord (F) remotn for stay of execution; Fld designation of record on appeal to be transmitted to US Court of Appeals. Copy of Notice of Appeal to Judge and to Jury Clerk.

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

**Civil No. 70-765-IH**

**UNITED STATES OF AMERICA, PLAINTIFF**

**v.**

**12 200-Ft. Reels of Super 8 mm FILM, 1 200-Ft. Reel of 8 mm FILM, 7 MAGAZINES Entitled "Simona", 2 1970 CALENDARS, 18 COLOR SLIDES, 9 Black and White PHOTOGRAPHS, 1 BOOKLET "Rendez-Vous", 17 BROCHURES for "Climax" Films, 5 BROCHURES for "Spot Light Film", 19 BROCHURES for the Magazines "Prince" and "Dream", 17 BROCHURES for the Film "Sixus", 5 Miscellaneous BROCHURES, 1 BOOKLET entitled "Dog-Instruction 4", 1 BOOKLET entitled "Animal Orgy", 1 BOOK entitled "animal Special", 1 ROLL 8 mm Film Marked "Undeveloped." "Do not open.",**  
**DEFENDANTS**

**COMPLAINT FOR FORFEITURE—Filed April 9, 1970**

For its claims against the defendants, the United States of America alleges as follows:

**I**

That this Court has jurisdiction under 28 U.S.C. § 1345 and 19 U.S.C. § 1305.

**II**

That on April 2, 1970, the defendants were imported into the commerce of the United States on behalf of A. Paladini.

**III**

That the plaintiff believes that the defendant roll of film marked "Undeveloped." "Do not open." is believed

to be obscene because of the nature of the merchandise which it accompanies. That the remaining defendants are obscene which fact makes the defendants subject to seizure and forfeiture under the provisions of 19 U.S.C. § 1805.

#### IV

That on April 2, 1970, the defendants were seized by duly authorized Customs Agents in Los Angeles, California, within the jurisdiction of this Court.

#### V

That the defendants are in the possession and custody of the United States Attorney, United States Court House, 312 North Spring Street, Los Angeles, California, or elsewhere within the jurisdiction of this Court.

WHEREFORE, the United States prays that due process issue to enforce the forfeiture of the defendants and that due notice of these proceedings be given to all interested parties.

WM. MATTHEW BYRNE, JR.  
United States Attorney  
FREDERICK M. BROSILO, JR.  
AUSA  
Chief of Civil Division

/s/ Larry L. Dier  
Assistant U. S. Attorney  
Attorneys for Plaintiff

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

**Civil No. 70-765-IH**

**UNITED STATES OF AMERICA, PLAINTIFF**

**v.**

**12 200-FT. REELS OF SUPER 8 MM FILM, ETC. (See  
Attachment for Complete Description.) DEFENDANT(S)**

**WARRANT FOR ARREST IN ACTION IN REM—  
Filed April 24, 1970**

**TO THE UNITED STATES MARSHAL FOR THE  
CENTRAL DISTRICT OF CALIFORNIA:**

A Complaint having been filed in this action, it is  
therefore—

ORDERED that you attach the defendant film, maga-  
zines, calendars, slides, etc. and detain the same in your  
custody until further order of the Court, and that you  
give due notice to all interested persons that they must  
file their Claims and Answers with the Clerk of this  
Court within the time allowed by law.

YOU ARE FURTHER ORDERED to file this process  
in this Court with your return thereon promptly after  
execution thereof.

**DATED: This 9th day of April, 1970.**

**EMORY G. HATCHER  
Clerk**

**/s/ Mabel McElwee  
Deputy Clerk**

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 70-765 IH

UNITED STATES OF AMERICA, PLAINTIFF

v.

12 200-Ft. Reels of Super 8 mm FILM, 1 200-Ft. Reel of 8 mm FILM, 7 MAGAZINES Entitled "Simona", 2 1970 CALENDARS, 18 COLOR SLIDES, 9 Black and White PHOTOGRAPHS, 1 BOOKLET "Rendez-Vous", 17 BROCHURES for "Climax" Films, 5 BROCHURES for "Spot Light Film", 19 BROCHURES for the Magazines "Prince" and "Dream", 17 BROCHURES for the Film "Sixus", 5 Miscellaneous BROCHURES, 1 BOOKLET entitled "Dog-Instruction 4", 1 BOOKLET entitled "Animal Orgy", 1 BOOK entitled "animal Special", 1 ROLL 8 mm Film Marked "Undeveloped." "Do not open.",  
DEFENDANTS

ORDER OF DISMISSAL—Filed April 27, 1970  
[Entered April 27, 1970]

It appearing that the complaint in this matter is based on 19 U.S.C. § 1305; it further appearing that a three-judge court in *United States of America v. 37 Photographs*, Civil No. 69-2242-F, determined that 19 U.S.C. § 1305 is unconstitutional on its face; and it further appearing that this Court ought to abide by that decision pending its possible review in the United States Supreme Court.

IT IS, THEREFORE, ORDERED that the within action is dismissed and that the United States Marshal return the defendant material to the importer.

DATED: This \_\_\_\_ day of April, 1970.

/s/ Warren J. Ferguson  
United States District Judge

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 70-765 IH

UNITED STATES OF AMERICA, PLAINTIFF

v.

12 200-Ft. REELS OF SUPER 8 MM FILM, ETC., ET AL.,  
DEFENDANTS

EX PARTE MOTION FOR ORDER STAYING EXECUTION OF  
ORDER OF DISMISSAL—Filed April 27, 1970

The plaintiff moves for an Order staying the Order of Dismissal dated April , 1970, and staying the order requiring the Marshal to return the defendant material to the importer. This motion is made on the ground that the constitutionality of 19 U.S.C. § 1305 is presently before the Supreme Court in the case of *United States of America v. 37 Photographs*, Central District of California, Case No. 69-2242-F, which has been appealed directly to the Supreme Court. This motion is made on the further ground that the defendant material goes substantially beyond that involved in the *37 Photographs* case and should not be released unless and until the Supreme Court affirms the lower court and holds that the Customs obscenity statute is unconstitutional.

This motion is made in accordance with Rule 8, Federal Rules of Appellant Procedure.

Pursuant to Local Rule 3(j), the Court is advised that the importer, A. Paladini, came to the United States Attorney's office on Friday, April 24, 1970, to discuss this matter. He stated that the defendant which is listed as 1 200' reel of 8 mm film is in reality a 16 mm film entitled "Eva 68." He further stated that the defendant which is identified as 1 roll of 8 mm film marked "Undeveloped. Do not open." contains approximately 40 feet of undeveloped film representing his efforts to make a documentary film unrelated to sex or obscenity.

Mr. Paladini was advised that this ex parte motion would be made and he stated that he did not intend to hire an attorney or to file a claim and answer.

The Court is further advised that copies of this motion as it was prepared for filing on April 22, 1970, were mailed to Mr. Paladini and were in his possession when he was in the United States Attorney's office on April 24, 1970. Assistant U. S. Attorneys Larry L. Dier and Philip S. Malinsky viewed the 16 mm film entitled "Eva 68", which is listed in the complaint as 1 200' reel of 8 mm film. As a result of this viewing, the plaintiff is willing to return this film to the importer as well as the film identified as 1 roll of 8 mm film marked "Undeveloped. Do not open." since they are not obscene. The plaintiff would, therefore, agree that these two items be returned to the importer as this time.

The Court is further advised that the plaintiff has no evidence with which to contradict Mr. Paladini's affidavit, and, therefore, does not contest the fact that this was a private importation.

DATED: April 24, 1970.

WM. MATTHEW BYRNE, JR.  
United States Attorney  
FREDERICK M. BROGIO, JR.  
Assistant U. S. Attorney  
Chief of Civil Division

/s/ Larry L. Dier  
LARRY L. DIER  
Assistant U. S. Attorney  
Attorneys for Plaintiff

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

**Civil No. 70-765 IH**

**UNITED STATES OF AMERICA, PLAINTIFF**

**v.**

**12 200-Ft. REELS OF SUPER 8 MM FILM, ETC., ET AL.,**

**DEFENDANTS**

**ORDER RE MOTION FOR STAY OF EXECUTION—**

**Filed April 27, 1970**

The Court having read the Ex Parte Motion for Order Staying Execution of Order of Dismissal, as well as the rest of the papers on file herein, and it appearing that this importation was for private rather than commercial purposes

IT IS HEREBY ORDERED that the motion for a stay of the order to return the defendant articles is denied.

**DATED: This 27 day of April, 1970.**

**/s/ Warren J. Ferguson  
United States District Judge**

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 70-765 IH

UNITED STATES OF AMERICA, PLAINTIFF

v.

12 200-Ft. REELS OF SUPER 8 MM FILM, ETC., ET AL.,  
DEFENDANTS

AFFIDAVIT OF ARIEL G. PALADINI—Filed April 27, 1970

STATE OF CALIFORNIA            )  
  )    SS.  
COUNTY OF LOS ANGELES    )

ARIEL G. PALADINI, being first duly sworn, deposes and says:

1. I am the person who imported the defendant objects, although some of them are misdescribed. That none of the defendants were imported by me for any commercial purpose but were intended to be used and possessed by me personally.

The defendant that is listed as 1 roll 8 mm film marked "Do not open" is in fact a roll of undeveloped 16 mm film which is a color film taken by me in Denmark of historical buildings and landmarks and is in no way related to the subject matter of some of the other defendant objects. I agree to pay the cost of developing this film so that what I have said about its content can be verified.

Regarding the defendant film that is described in the complaint as 1 200' reel of 8 mm film, I declare is actually a reel of 8 mm super film with sound which is entitled "Eva 68." I further declare that it is, like the undeveloped film, not like the rest of the defendant objects and should be released to me.

**DATED: April 24, 1970.**

**/s/ Ariel G. Paladini**

**ARIEL G. PALADINI**

**Subscribed and sworn to before me this 24th day of April, 1970.**

**/s/ Lois M. Parkinson**

**LOIS M. PARKINSON**

**Notary Public in and for  
said County and State**

**My Commission expires Nov. 9, 1970.**

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 70-765 IH

UNITED STATES OF AMERICA, PLAINTIFF

v.

12 200-FT. REELS OF SUPER 8 MM FILM, ETC., ET AL.,  
DEFENDANTS

NOTICE OF APPEAL—Filed April 27, 1970

Plaintiff, United States of America, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order of Dismissal entered in this case on April 7, 1970.

The attorneys for the parties and their addresses are: For the plaintiff, United States of America, Wm. Matthew Byrne, Jr., United States Attorney, Frederick M. Brosio, Jr., Assistant U. S. Attorney, Chief of Civil Division, and Larry L. Dier, Assistant U. S. Attorney, United States Court House, 312 North Spring Street, Los Angeles, California, 90012; the importer of the defendant is A. Paladini who gave as his address 23 La Porte Avenue, Arcadia, California. He is not known to be represented by an attorney.

DATED: April 22, 1970.

WM. MATTHEW BYRNE, JR.  
United States Attorney  
FREDERICK M. BROSIO, JR.  
AUSA  
Chief of Civil Division

/s/ Larry L. Dier  
LARRY L. DIER  
Assistant U. S. Attorney  
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 70-765 IH

UNITED STATES OF AMERICA, PLAINTIFF

v.

12 200-Ft. REELS OF SUPER 8 MM FILM, ETC., ET AL.,  
DEFENDANTS

EX PARTE MOTION FOR STAY OF ORDER OF DISMISSAL  
AND ORDER THEREON—Filed May 7, 1970

The plaintiff moves for an Order staying the Order of Dismissal which was entered on April 27, 1970, for a period of approximately two weeks, until May 22, 1970. The reason for this requested stay is to give the Department of Justice additional time to consider whether to apply to the Supreme Court for a stay of execution pending appeal, which stay was refused by the Ninth Circuit on May 4, 1970.

This motion is made to stay the return order as to all of the defendant articles except the motion picture film "Eva 68" and the roll of 8 mm film marked "Undeveloped. Do not open." These two defendants should be returned to the importer at once because they are not obscene.

Pursuant to Local Rule 3(j), the Court is advised that the importer, Mr. Ariel G. Paladini, was advised on May 6, 1970, that this application would be made. Mr. Paladini advised the undersigned that he had no objection to the stay requested and did not intend to appear to contest it.

**DATED: May 6, 1970.**

**WM. MATTHEW BYRNE, JR.**  
**United States Attorney**  
**FREDERICK M. BROSIO, JR.**  
**Assistant U. S. Attorney**  
**Chief of Civil Division**

**/s/ Larry L. Dier**  
**LARRY L. DIER**  
**Assistant U. S. Attorney**  
**Attorneys for Plaintiff,**  
**United States of America**

**IT IS SO ORDERED this 7 day of May, 1970.**

**/s/ Warren J. Ferguson**  
**United States District Judge**

SUPREME COURT OF THE UNITED STATES  
No. —, October Term, 1969

UNITED STATES, APPELLANT

vs.

12 200-Ft. REELS OF SUPER 8 MM FILM, ET AL.

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ORDER

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UPON CONSIDERATION of the application of the Solicitor General,

IT IS ORDERED that the judgment of the United States District Court for the Central District of California dismissing the government's action for customs forfeiture of certain material as obscene, entered on April 27, 1970, be, and the same is hereby, stayed pending the timely perfecting of an appeal in this Court. Should the appeal be timely filed in this Court, this stay is to remain in effect pending the sending down of the judgment of this Court.

/s/ WILLIAM J. BRENNAN, JR.  
Associate Justice of the  
Supreme Court of the  
United States

Dated this 20 day of May, 1970.

A true copy

Test:

JOHN F. DAVIS  
Clerk of the Supreme Court  
of the United States

By /s/ Michael Rodak, Jr.  
Deputy

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 70-765 IH

UNITED STATES OF AMERICA, PLAINTIFF

v.

12 200-Ft. REELS OF SUPER 8 MM FILM, ETC., ET AL.,  
DEFENDANTS

NOTICE OF APPEAL TO THE SUPREME COURT OF THE  
UNITED STATES—Filed May 18, 1970

Plaintiff, United States of America, hereby appeals to the United States Supreme Court under the provisions of 28 U.S.C. §§ 2101 and 2282 from the Order of Dismissal entered in this case on April 27, 1970.

The attorneys for the parties and their addresses are: For the plaintiff, United States of America, Robert L. Meyer, United States Attorney, Frederick M. Brosio, Jr., Assistant United States Attorney, Chief, Civil Division, and Larry L. Dier, Assistant United States Attorney, United States Court House, 312 North Spring Street, Los Angeles, California, 90012; for the claimant, Ariel G. Paladini, Post Office Box 451, Sierra Madre, California, 91024.

DATED: This 18th day of May, 1970.

ROBERT L. MEYER  
United States Attorney  
FREDERICK M. BROSIO, JR.  
Asst. U. S. Attorney  
Chief, Civil Division

/s/ Larry L. Dier  
LARRY L. DIER  
Asst. U. S. Attorney  
Attorneys for Plaintiff,  
United States of America

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**No. 25788**

**UNITED STATES OF AMERICA, APPELLANT**

**vs.**

**12—200 Ft. REELS OF SUPER 8 MM FILM, ETC.,  
ARIEL G. PALADINI, APPELLEE**

**CERTIFICATE OF CLERK, UNITED STATES COURT OF AP-  
PEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED  
UNDER RULE 21 OF THE REVISED RULES OF THE SU-  
PREME COURT OF THE UNITED STATES**

**I, WILLIAM B. LUCK, as Clerk of the United States  
Court of Appeals for the Ninth Circuit do hereby certify  
the foregoing transcript of record, which is the original  
transcript of record received from the Clerk of the Dis-  
trict Court in the above entitled cause and certified at  
the request of the counsel for the appellant USA, before  
judgment of this Court, under Rule 20 of the Revised  
Rules of the Supreme Court of the United States.**

**ATTEST my hand and the seal of the said  
the United States Court of Appeals for the  
Ninth Circuit, at the City of San Fran-  
cisco, in the State of California, this 20th  
day of May, 1970.**

**/s/ William B. Luck  
WILLIAM B. LUCK  
Clerk**

**SUPREME COURT OF THE UNITED STATES****No. 364, October Term, 1970****UNITED STATES, APPELLANT****v.****12 200-Ft. REELS OF SUPER 8 MM. FILM ET AL.**

**APPEAL** from the United States District Court for the Central District of California.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

**June 21, 1971**

**In the Supreme Court of the United States**

**OCTOBER TERM, 1970**

---

**No.**

**UNITED STATES OF AMERICA, APPELLANT**

**v.**

**12 200-Ft. REELS OF SUPER 8 mm. FILM, ET AL.**

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

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**JURISDICTIONAL STATEMENT**

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**ORDER BELOW**

The order of the district court (Appendix A, *infra*)  
is not yet reported.

**JURISDICTION AND STATEMENT**

The present action involves films, magazines and other materials sought to be imported into the United States at Los Angeles by Mr. Ariel G. Paladini. The materials were seized upon customs inspection under the authority of 19 U.S.C. 1305(a), and a forfeiture

proceeding was then commenced upon the ground that the materials are "obscene" within the meaning of that section. On April 27, 1970, the single district judge dismissed the government's action, and ordered return of the seized materials (Appendix A, *infra*), on the basis that Section 1305(a) had been declared unconstitutional on its face by a three-judge district court sitting in the same district. *United States v. Thirty-Seven (37) Photographs*, Jurisdictional Statement filed, No. 133, this Term. On that same date, Mr. Paladini filed an affidavit to the effect that "none of the [materials] were imported by me for any commercial purpose but were intended to be used and possessed by me personally"; the government responded that it had no evidence to contradict this averment.

A notice of appeal to this Court was filed in the district court on May 18, 1970 (Appendix B, *infra*).<sup>1</sup> Under 28 U.S.C. 1252, this Court has jurisdiction on direct appeal to review an order of a United States District Court "holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States \* \* \* is a party." See, e. g., *United States v. Raines*, 362 U.S. 17; *United States v. Sanchez*, 340 U.S. 42.

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<sup>1</sup> Application for stays having been denied by the court below, the government sought a stay from this Court. On May 20, 1970, Mr. Justice Brennan granted the government's application pending the timely perfecting of an appeal in this Court, with the proviso that should the appeal be timely filed the stay is to remain in effect "pending the sending down of the judgment of this Court."

The order of the district court herein, relying on the three-judge court decision in *Thirty-Seven (37) Photographs, supra*, is a holding that Section 1305 (a) is unconstitutional, *Clark v. Gabriel*, 393 U.S. 256; the United States is a party; and the *in rem* proceeding for customs forfeiture is in the nature of a civil action. See Brief for the United States in *United States v. United States Coin and Currency*, set for reargument, No. 5, this Term, pp. 11-17.

### QUESTION PRESENTED

Whether the United States may validly prohibit the importation of obscene matter which the importer claims is intended for personal use and possession.

### STATUTE INVOLVED

19 U.S.C. 1305(a) provides in pertinent part:

All persons are prohibited from importing into the United States from any foreign country \* \* \* any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral \* \* \*. No such articles whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the collector that the obscene or other prohibited articles contained in the package were inclosed therein without the knowledge or consent of the importer, owner, agent, or consignee, the entire contents of the package in

which such articles are contained, shall be subject to seizure and forfeiture as hereinafter provided: \* \* \* *Provided, further,* That the Secretary of the Treasury may, in his discretion, admit the so-called classics or books of recognized and established literary or scientific merit, but may, in his discretion, admit such classics or books only when imported for noncommercial purposes.

Upon the appearance of any such book or matter at any customs office, the same shall be seized and held by the collector to await the judgment of the district court as hereinafter provided; and no protest shall be taken to the United States Customs Court from the decision of the collector. Upon the seizure of such book or matter the collector shall transmit information thereof to the district attorney of the district in which is situated the office at which such seizure has taken place, who shall institute proceedings in the district court for the forfeiture, confiscation, and destruction of the book or matter seized. Upon the adjudication that such book or matter thus seized is of the character the entry of which is by this section prohibited, it shall be ordered destroyed and shall be destroyed. Upon adjudication that such book or matter thus seized is not of the character the entry of which is by this section prohibited, it shall not be excluded from entry under the provisions of this section.

In any such proceeding any party in interest may upon demand have the facts at issue determined by a jury and any party may have an appeal or the right of review as in the case of ordinary actions or suits.

## THE QUESTION IS SUBSTANTIAL

This case presents a useful companion to the government's pending appeal in *United States v. Thirty-Seven (37) Photographs*, No. 133, this Term—the decision relied upon by the court below. In that case a three-judge district court held the customs obscenity statute, 19 U.S.C. 1305(a), unconstitutional on its face under *Freedman v. Maryland*, 380 U.S. 51, and *Stanley v. Georgia*, 394 U.S. 557, after the importer-claimant had stipulated that the materials were intended for commercial distribution. Here, the importer has averred that the materials are intended for purely personal use and possession. If the Court notes probable jurisdiction in *Thirty-Seven (37) Photographs*, it should also consider this case, which presents another facet of the same problem.

The views of the United States as to the meaning of *Stanley v. Georgia*, *supra*, are set forth in our Jurisdictional Statement in *Thirty-Seven (37) Photographs* and our Brief as *Amicus Curiae* in *Byrne v. Karalexis*, set for reargument, No. 83, this Term. We do not repeat that analysis here. In essence it is our position that *Stanley* held only that the government lacks power to punish or bar the possession of obscene material “in the privacy of a person’s own home,” 394 U.S. at 564, and did not purport to decide (as the court in *Thirty-Seven (37) Photographs* construed it to hold) that private individuals have a right to receive matter which is obscene under the standards established in *Roth v. United States*, 354 U.S. 476 and subsequent cases, or to bring it past

the customs station.<sup>2</sup> As we elaborated in our Jurisdictional Statement in *Thirty-Seven (37) Photographs, supra*, pp. 8-9, 19 U.S.C. 1305(a) is constitutional, in our view, whether an importation of obscene material is intended for commercial or for wholly private purposes. In light of the admittedly commercial purpose of the importation in *Thirty-Seven (37) Photographs*, however, it is apparent that reversal in that case would leave open the question presented by the case at bar, i.e., whether the government's constitutional power to regulate foreign commerce (Article 1, Section 8) gives it authority to bar the importation of obscene material stated to be intended for private use. We submit that it does, and that *Stanley v. Georgia* does not hold to the contrary. This is plainly a question of substantial significance warranting plenary consideration by this Court.

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<sup>2</sup> We would submit that, at least some of the materials in this case (including four booklets submitted to Mr. Justice Brennan in connection with the government's previous application for a stay), are obscene under any standard heretofore expressed in this Court's opinions.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should note probable jurisdiction.

**ERWIN N. GRISWOLD,**  
*Solicitor General.*

**WILL WILSON,**  
*Assistant Attorney General.*

**JEROME M. FEIT,**  
**ROGER A. PAULEY,**  
*Attorneys.*

**JULY 1970.**

## APPENDIX A

[Filed Apr. 27, 1970      Entered Apr. 27, 1970]

Wm. MATTHEW BYRNE, JR.

United States Attorney

FREDERICK M. BROSIO, JR.

Assistant U. S. Attorney

Crief of Civil Division

LARRY L. DIER

Assistant U. S. Attorney

1100 U. S. Court House

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Los Angeles, California 90012

Telephone: 688-2461

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 70-765 IH

UNITED STATES OF AMERICA, PLAINTIFF

v.

12 200-Ft. Reels of Super 8 mm FILM, 1 200-Ft. reel of 8 mm FILM, 7 MAGAZINES entitled "Simona", 2 1970 CALENDARS, 18 COLOR SLIDES, 9 black and white PHOTOGRAPHS, 1 BOOKLET "Rendez-Vous", 17 BROCHURES for "Climax" films, 5 BROCHURES for "Spot Light Film", 19 BROCHURES for the magazines "Prince" and "Dream", 17 BROCHURES for the film "Sixus", 5 miscellaneous BROCHURES, 1 BOOKLET entitled "Dog-Instruction 4", 1 BOOKLET entitled "Animal Orgy", 1 BOOK entitled "Animal Special", 1 ROLL 8 mm film marked "Undeveloped." "Do not open.", DEFENDANTS

# ORDER OF DISMISSAL

It appearing that the complaint in this matter is based on 19 U.S.C. § 1305; it further appearing that a three-judge court in *United States of America v. 37 Photographs*, Civil No. 69-2242-F, determined that 19 U.S.C. § 1305 is unconstitutional on its face; and it further appearing that this Court ought to abide by that decision pending its possible review in the United States Supreme Court.

IT IS, THEREFORE, ORDERED that the within action is dismissed and that the United States Marshal return the defendant material to the importer.

DATED: This 27 day of April, 1970.

WARREN J. FERGUSON  
United States District Judge

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II. <i>United States v. Reidel</i> and <i>United States</i> <i>v. Thirty-Seven (37) Photographs</i> es- tablish that there is no right to pur- chase obscene materials in this country or have them sent from abroad and it would be odd to create a right of im- portation for those who personally pur- chase obscene materials abroad.....	11
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## OPINION BELOW

The order of the district court (A. 3) denying

## REASONING

On April 27, 1970, the district court entered a

The court ruled on the motion to *United States v. Thirty-Seven (37) Photographs*, 309 F. Supp. 36 (D.C. 1971), reversed, 402 U.S. 363.

# **In the Supreme Court of the United States**

**OCTOBER TERM, 1971**

**No. 70-2**

**UNITED STATES OF AMERICA, APPELLANT**

**v.**

**12 200-FT. REELS OF SUPER 8 MM. FILM, ET AL.**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE CENTRAL DISTRICT OF CALIFORNIA**

**BRIEF FOR THE UNITED STATES**

## **OPINION BELOW**

The order of the district court (A. 5) dismissing the forfeiture complaint is not reported.

## **JURISDICTION**

On April 27, 1970, the district court dismissed a complaint for forfeiture based on 19 U.S.C. 1305(a), relying on a decision of a three-judge court that the statute was unconstitutional on its face (A. 5).<sup>1</sup> A notice of appeal to this Court was filed in the district court on May 18, 1970 (A. 15). Probable jurisdiction

<sup>1</sup> The court relied on the decision in *United States v. Thirty-Seven (7) Photographs*, 309 F. Supp. 36 (C.D. Calif.), reversed, 402 U.S. 363.

was noted on June 21, 1971. (A. 17). The jurisdiction of this Court rests on 28 U.S.C. 1252. See, *e.g.*, *United States v. Raines*, 362 U.S. 17; *Clark v. Gabriel*, 398 U.S. 256.

#### QUESTION PRESENTED

Whether the United States may validly prohibit the importation of obscene matter which the importer claims is intended for personal use and possession.

#### STATUTE INVOLVED

Section 305(a) the Tariff Act of June 17, 1930, 46 Stat. 688, as amended (19 U.S.C. 1305(a)), provides in pertinent part:

All persons are prohibited from importing into the United States from any foreign country \*\*\* any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral \*\*\*. No such articles whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the collector that the obscene or other prohibited articles contained in the package were inclosed therein without the knowledge or consent of the importer, owner, agent, or consignee, the entire contents of the package in which such articles are contained, shall be subject to seizure and forfeiture as hereinafter provided: \*\*\* Pro-

*vided, further,* That the Secretary of the Treasury may, in his discretion, admit the so-called classics or books of recognized and established literary or scientific merit, but may, in his discretion, admit such classics or books only when imported for noncommercial purposes.

Upon the appearance of any such book or matter at any customs office, the same shall be seized and held by the collector to await the judgment of the district court as hereinafter provided; and no protest shall be taken to the United States Customs Court from the decision of the collector. Upon the seizure of such book or matter the collector shall transmit information thereof to the district attorney of the district in which is situated the office at which such seizure has taken place, who shall institute proceedings in the district court for the forfeiture, confiscation, and destruction of the book or matter seized. Upon the adjudication that such book or matter thus seized is of the character the entry of which is by this section prohibited, it shall be ordered destroyed and shall be destroyed. Upon adjudication that such book or matter thus seized is not of the character the entry of which is by this section prohibited, it shall not be excluded from entry under the provisions of this section.

In any such proceeding any party in interest may upon demand have the facts at issue determined by a jury and any party may have an appeal or the right of review as in the case of ordinary actions or suits.

## STATEMENT

On April 2, 1970, claimant (Ariel Paladini) sought to import into the United States movie film, color slides, photographs, copies of a magazine, brochures for films, booklets, a book and calendars. These materials were seized by customs authorities at Los Angeles and the matter was referred to the United States Attorney for forfeiture action. An April 9, 1970, a complaint was filed under 19 U.S.C. 1305(a) in the United States District Court for the Central District of California for forfeiture of these items as obscene (A. 2-3). On April 27, 1970, the district judge relying on the decision by a three-judge court in *United States v. Thirty-Seven (37) Photographs*, 309 F. Supp. 36 (C.D. Calif.), dismissed the complaint (A. 5).<sup>2</sup> Thereafter, the United States filed a motion to stay the dismissal order (A. 6-7), and Mr. Paladini filed an affidavit stating that "none of the \* \* \* [materials] were imported by me for any commercial purpose but were intended to be used and possessed by me personally" (A. 9). In its motion, the government replied that it had no evidence with which to contradict this statement (A. 7).<sup>3</sup> The request for a stay was denied by the district court (A. 12-13). The government then sought a stay from this Court. On May 20, 1970, Mr. Justice Brennan granted the government's application with the proviso

<sup>2</sup> The timing of the steps in this case complies with the limits set in *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363.

<sup>3</sup> One reel of a motion picture film and a roll of undeveloped film was returned to Mr. Paladini (see A. 12).

that should the appeal be timely filed the stay would remain in effect pending the judgment of this Court (A. 14).

#### SUMMARY OF ARGUMENT

Since obscenity is not constitutionally protected speech, and as numerous decisions assume, no one has a constitutional right to purchase obscene materials in this country or purchase them by mail from abroad, it follows that no one has a constitutional right to import obscene materials for personal use after having purchased them abroad. The broad powers of Congress over foreign commerce permit it to exclude materials not protected by the First Amendment. *Stanley v. Georgia*, 394 U.S. 557, does not lead to a different conclusion, for that case rests on the importance of privacy in the home, a consideration not involved in a prohibition on importation.

*United States v. Reidel*, 402 U.S. 351, and *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, reaffirm the well-established rule that there is no constitutional right to purchase obscene materials. In *Thirty-Seven (37) Photographs* this Court upheld the statutory prohibition on importation of obscene materials in its application to materials imported for commercial use and the plurality opinion reached the same conclusion with respect to materials imported for private use. In light of Congressional and state power to prohibit commercial mailings, importation, and sales of obscene materials, it would be odd to hold that one has a constitutionally protected right to bring into this country obscene materials purchased abroad.

The "privacy" aspect so prominent in *Stanley* is absent in this setting. The power of customs officials to search luggage is a well-settled aspect of the power to prevent smuggling. It is highly unlikely, in light of the need to search for ordinary contraband and to prevent commercial importation of obscene materials, that the scope of searches would be significantly affected by immunizing importation for personal use. Thus such a rule would yield no measurable gain for individual privacy.

The creation of a constitutional right of importation for private use would seriously undercut the prohibition of commercial importation, since ordinarily it cannot be ascertained if a claim that materials are for private use is honestly made. Once materials pass through customs, it would be virtually impossible to trace them in order to assure that they are not used commercially, and thus the enforcement of other federal and state laws against the dissemination of obscene materials would be rendered more difficult. This impairment of concededly legitimate statutes would be justified if a constitutional right were involved, but the prohibition of importation of obscene materials for private use is consistent with this Court's constitutional decisions and does not restrict protected speech or interfere significantly with privacy.

#### ARGUMENT

#### CONGRESS HAS THE POWER TO PROHIBIT IMPORTATION OF OBSCENE MATTER FOR PRIVATE USE

Last Term, this Court in *United States v. Reidel*, 402 U.S. 351, and *United States v. Thirty-Seven* (37)

*Photographs*, 402 U.S. 363, reaffirmed its decision in *Roth v. United States*, 354 U.S. 476, 485, that "obscenity is not within the area of constitutionally protected speech or press." In *Reidel* it held that Congress may constitutionally prevent the mails from being used for distributing pornography even to willing recipients who state they are adults. In *Thirty-Seven (37) Photographs*, it sustained the power of the United States to prohibit the commercial importation of obscene matter. These decisions confirm the import of many earlier cases, e.g., *Roth v. United States*, 354 U.S. 476; *Manual Enterprises v. Day*, 370 U.S. 478; *Ginzburg v. United States*, 383 U.S. 463, that there is no constitutionally established right to purchase obscene materials. If, as is clear, Congress and the states may prohibit the sale and purchase of obscene materials without violating the First Amendment, then it follows that Congress with its broad powers over foreign commerce, may forbid the importation of obscene materials by those who have purchased them abroad, even if those attempting to import the materials claim they are for private use. As we show below, the contention that Congress lacks such power rests upon a reading of *Stanley v. Georgia*, 394 U.S. 557,<sup>4</sup> that is unduly broad as *Reidel* and *Thirty-Seven (37) Photo-*

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<sup>4</sup> See *United States v. Thirty-Seven (37) Photographs*, 309 F. Supp. 36 (C.D. Calif.), upon which the court below relied. See also *United States v. Various Articles of "Obscene" Merchandise*, 315 F. Supp. 191 (S.D. N.Y.), probable jurisdiction noted, May 17, 1971, No. 796, Oct. Term, 1970, dismissed pursuant to Rule 60, June 23, 1971.

*graphs* indicate. In *Stanley*, this Court held only that the First Amendment does not permit governmental authority to interfere with an individual's right privately to possess obscene materials in his own home. It did not establish that an individual has a First Amendment right to bring obscene items into his own home so long as he is able to buy them abroad.

# I.

## STANLEY V. GEORGIA RESTS ON THE PRIVACY OF THE HOME AND DOES NOT CREATE A RIGHT WHICH OVERRIDES THE SWEEPING POWER OF CONGRESS TO REGULATE FOREIGN COMMERCE

In *Stanley v. Georgia*, 394 U.S. 557, state agents entered appellant's home under a search warrant which authorized them to seize evidence of book-making. In the course of the search, they unexpectedly discovered a roll of motion picture film and a projector. They viewed the film, concluded it was obscene, and arrested appellant. He was convicted under state law for "knowingly hav[ing] possession of \* \* \* obscene matter." 394 U.S. at 558. Proceeding on the assumption that the film was obscene, this Court nonetheless reversed the conviction, holding that "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime." 394 U.S. 568. The Court's opinion indicated that the decision was essentially grounded on a combination of the Fourth Amendment proscription of

“unwanted governmental intrusions into one’s privacy” (*id.* at 564) and the First Amendment prohibition of governmental “control [over] the moral content of a person’s thoughts” (*id.* at 565).

In *Stanley*, this Court did not say that materials otherwise obscene are somehow rendered non-obscene because they are privately possessed; nor did it hold that anyone has a constitutional right to obtain obscene materials for home viewing. Rather, it protected an individual’s right to privacy in his own home, in the circumstances of that case, whether or not materials of the sort in question might be subject to the obscenity laws in a different context. Quoting Mr. Justice Brandeis’ classic language about “the right to be let alone—the most comprehensive of rights and the right most valued by civilized men” (dissenting in *Olmstead v. United States*, 277 U.S. 438, 478),<sup>\*</sup> the Court noted that “fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one’s privacy” (394 U.S. 564). In another context, Mr. Justice Harlan has written of the law’s “solicitude to protect the privacies of the life within” the home, dissenting in *Poe v. Ullman*, 367 U.S. 497, 551, and clearly this solicitude underlay the result in *Stanley*, as it underlay the decision in *Griswold v. Connecticut*, 381 U.S. 479.

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<sup>\*</sup> See *Rowan v. Post Office*, 397 U.S. 728, in which this Court concluded that a householder could refuse to receive material that he considered to be obscene.

This right to be free from governmental interference with the possession of obscenity in one's home does not carry with it the right to override all other governmental powers in order to obtain obscene material. *Stanley*, to be sure, mentioned a "right to receive information and ideas, regardless of their social worth" (394 U. S. at 564). In the context of that case, that meant that a homeowner had a right to receive any material in his home for his own personal use without subjecting his home to search (on a warrant obtained for another purpose) and without subjecting himself to prosecution for possession in his home. A person might hesitate to bring a book or object into his home if to do so would open the door to a governmental intrusion on that private area. Since "the line between speech unconditionally guaranteed and speech which may be legitimately regulated, suppressed, or punished is finely drawn," *Speiser v. Randall*, 357 U.S. 513, 525, to subject homeowners to searches for possession of obscene materials would induce self-censorship reaching to protected speech, cf. *Smith v. California*, 361 U.S. 147, and would generate a "chilling effect" upon the exercise of the First Amendment right to peruse materials that are not obscene.\* Thus, we submit the central thought of *Stanley* is not that the particular books or films an individual has and uses in the privacy of his home or office constitute speech

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\*Even though obscene materials may not constitute speech protected by the First Amendment, the history of obscenity cases in this Court teaches that obscenity is often not self-identifying; there must be a careful examination to determine the issue in each case, and on one side of the line the materials involved are protected.

protected by the First Amendment, but rather that the panoply of values which the First Amendment, the Fourth Amendment, and other provisions of the Bill of Rights, seek to protect (cf. *Griswold v. Connecticut*, 381 U. S. 479) would be too endangered by the necessarily intrusive inquiry to determine the nature of materials possessed in the home.

## II.

UNITED STATES v. REIDEL AND UNITED STATES v. THIRTY-SEVEN (37) PHOTOGRAPHS ESTABLISH THAT THERE IS NO RIGHT TO PURCHASE OBSCENE MATERIALS IN THIS COUNTRY OR HAVE THEM SENT FROM ABROAD AND IT WOULD BE ODD TO CREATE A RIGHT OF IMPORTATION FOR THOSE WHO PERSONALLY PURCHASE OBSCENE MATERIALS ABROAD

*United States v. Reidel, supra*, and *United States v. Thirty-Seven (37) Photographs, supra*, make clear that there is no broad constitutional "right to receive" obscene materials for private use. *Reidel* rests on the previously well-established principle that the federal government can prohibit the commercial dissemination of obscene materials through the mails. Mr. Justice White's majority opinion states that "Nothing in *Stanley* questioned the validity of *Roth* insofar as the distribution of obscene material was concerned" and indicates the irrelevance of *Stanley* for those "who have no claim \* \* \* about unwanted governmental intrusions into the privacy of their home" (402 U.S. at 354, 355). Mr. Justice Harlan, concurring, noted that *Stanley* did not undercut *Roth*, which "means that

government may proscribe obscenity as such rather than merely regulate it with reference to other state interests \* \* \* (402 U.S. at 358).

*Thirty-Seven (37) Photographs* decided that 19 U.S.C. 1305(a), the same statutory provision involved in this case, is constitutional insofar as it prohibits the importation of obscene materials for commercial distribution and provides for the seizure at customs and ultimate forfeiture of such materials. In the part of Mr. Justice White's majority and plurality opinion joined by the Chief Justice, Mr. Justice Brennan, and Mr. Justice Blackmun, the claim that the provision is overbroad in reaching importation for private use is rejected because "a port of entry is not a traveler's home" and *Stanley* does not "extend to one seeking to import obscene materials from abroad, whether for private use or public distribution" (402 U.S. at 376).<sup>1</sup>

If the federal government can forbid the mailing and importation of obscene materials for commercial purposes, and the states can forbid the sale of such materials, see, e.g., *Alberts v. California* (decided with *Roth v. United States*), 354 U.S. 476; *Memoirs v. Massachusetts*, 383 U.S. 413, there is plainly no constitutionally established right to purchase such materials for private use. Since the federal government has con-

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<sup>1</sup> Mr. Justice Stewart, concurring, intimates a different view about the relevance of *Stanley* to importation for private use (402 U.S. at 379), but his opinion does not consider the very significant difference between invasion of the home to investigate possible criminal charges and the refusal to allow obscene materials through Customs.

control over mail from foreign sources at least equivalent to its control over purely domestic mail and 18 U.S.C. 1461 covers such mail, there is clearly no right to receive by mail obscene materials commercially disseminated from abroad. In light of these established principles, it would be odd to hold that one who does not have a constitutional right to purchase obscene materials inside this country or by mail from abroad does have a constitutionally protected right to bring into this country through the channels of foreign commerce obscene materials he has purchased abroad.

### III.

#### THE PROHIBITION OF IMPORTATION OF OBSCENE MATERIAL FOR PRIVATE USE DOES NOT SIGNIFICANTLY AFFECT THE SCOPE OF CUSTOMS SEARCHES OR "CHILL" THE IMPORTATION OF OTHER MATERIALS

The considerations at the heart of *Stanley* which forbid a state either to issue a warrant to search for obscene material in a private home, or to penalize a person for possession of such material in his home for his own personal use, are absent in a border search. A customs search at the nation's borders is different from a police search through a private library. An individual's luggage, as well as his person, has traditionally been subject to examination by governmental authorities at customs without probable cause or a search warrant; this has been explicitly authorized by federal statutes since at least 1866, 19 U.S.C. 482, 1582; *Carroll v. United States*, 267 U.S. 132, 150-154; *Boyd v. United States*, 116 U.S. 616, 623-624;

*Alexander v. United States*, 362 F. 2d 379, 382 (C.A. 9), certiorari denied, 385 U.S. 977. Cf. *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 76. Constitutionally, it is rooted in the power of Congress "to regulate Commerce with foreign Nations." Article I, Section 8. Such searches are "intimately associated with excluding illegal articles from the country", *Thirty Seven (37) Photographs*, 402 U.S. at 376, and are necessary unless the government's legitimate objective of preventing smuggling is severely to be impaired. Because of this paramount governmental interest, property which in other circumstances is afforded greater protection is subject to examination at the border. Indeed, it is not too much to say that a person entering the country consents to such a search.

It would, of course, not be feasible to insulate all books, papers, and groups of photographs from border inspections, since they may be used to conceal ordinary kinds of contraband. Moreover, enforcement of Section 1305(a) as it applies to obscene matter for commercial dissemination, upheld in *Thirty-Seven (37) Photographs, supra*, requires examination of materials to see if they are obscene and likely to be used for commercial exploitation. In short, the scope of customs searches will not be affected by the way in which this case is decided, or it will be affected only insignificantly. Thus a decision that materials intended for private use can not be stopped at the border would yield no measurable gain for the privacy of individuals as they pass through customs. This is in complete contrast to the situation in *Stanley* where the funda-

mental principle of the privacy of the home was at stake.

In terms of the First Amendment value of interchange of ideas, see, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-270; *Abrams v. United States*, 250 U.S. 616, 630 (Holmes, J. dissenting), whatever minimal effect Section 1305(a) might have on importation of protected material is much more significant in the context of materials for commercial dissemination than those for personal use. If the commercial distributor hesitates to import materials that are borderline but constitutionally protected, other persons will be deprived of access to these materials. But one who brings items into the country for personal use has already had a chance to look at the items he purchases. If he fails to bring them into this country, the effect on the open interchange of ideas will be minimal.

#### IV.

THE PROHIBITION AGAINST IMPORTATION FOR COMMERCIAL DISSEMINATION, AND OTHER LAWS AGAINST THE DISTRIBUTION OF OBSCENITY, CANNOT BE EFFECTIVE IF A RIGHT TO IMPORT IS GROUNDED ON THE IMPORTER'S STATED PROSPECTIVE USE OF OBSCENE MATERIALS

Enforcement of concededly valid laws against the importation and dissemination of obscenity would be seriously undercut if importation for private use were held to be protected. Such a ruling would make it extraordinarily difficult, if not impossible, to enforce Section 1305(a) as it relates to materials for commercial dissemination that are not self-identifying. With

few exceptions, the same material that could be imported for personal use could also be reproduced and sold, as indeed the materials in this case demonstrate. Customs officials will usually have no workable way of ascertaining the truth or falsity of an assertion that material is intended for private use; and once material is admitted it is effectively beyond the reach of the border screening process.

Moreover, there is no practical or feasible way to follow the property and see whether it is actually retained for private use only. Once the property has been admitted to the country, it is, for all practical purposes, a part of the general mass of property in the country.

It is unrealistic to hold that the Constitution requires that items may be imported for personal use, although Congress has the constitutional power to bar their importation for commercial purposes. Expansion of *Stanley v. Georgia* to cover this might be an example of what Justice Holmes wrote in *Hudson County Water Company v. McCarter*, 209 U.S. 349, 355, where he said:

All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. \* \* \*

And he added (209 U.S. at 357):

It constantly is necessary to reconcile and to adjust different constitutional principles, each of which would be entitled to possession of the dis-

puted ground but for the presence of the others, as we already have said that it is necessary to reconcile and to adjust different principles of the common law. \* \* \*

In order to vindicate a right of privacy not clearly stated in the Constitution, the Court would surely not find a constitutional right to import narcotics for personal use. And there would not be a constitutional right to import diamonds for personal adornment, free of duty, on the ground that, for some, the wearing of diamonds is a kind of symbolic speech. In terms of privacy, there would appear to be no distinction between those cases and this. If it is sought to say that this case is different because it involves films, and the product of a printing press, examination of the materials should be a sufficient answer. This Court has decided that "obscenity is not within the area of constitutionally protected speech or press," *Roth v. United States*, 354 U.S. 476, 485, and reiterated that statement last Term. *United States v. Reidel*, 402 U.S. 351, 354.

To make importation of prohibited material turn on whether a claim is made of private use would be to reward those who plan commercial dissemination, but are disingenuous enough to say material is for private use and clever enough to import it in a manner that makes the claim plausible. Since material intended for commercial use will obviously be more often imported if importation for private purposes is immunized, enforcement of other federal and state laws will also be made more burdensome and less effective. This impairment of concededly legitimate stat-

utes would, of course, be warranted if compelled by the First Amendment or other constitutional protections, but forfeiture of obscene materials imported for private use is entirely consistent with this Court's constitutional decisions. It does not reach protected speech or interfere in any significant way with an individual's privacy.

#### CONCLUSION

The judgment of the district court should be reversed.

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SEPTEMBER 1971.

## Supreme Court of the United States

OCTOBER TERM, 1971.

No. 70-2.

Supreme Court, U.S.

FILED

OCT 26 1971

E. ROBERT SEAVER, CLERK

UNITED STATES OF AMERICA,

*Appellant,*

v.

12 200-FT. REELS OF SUPER 8 MM. FILM ET AL.,

*Appellees.*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
CENTRAL DISTRICT OF CALIFORNIA.MOTION OF CHRISTOPHER W. WALKER FOR  
LEAVE TO FILE BRIEF AMICUS CURIAE AND  
BRIEF AMICUS CURIAE IN SUPPORT OF  
CLAIMANT-APPELLEE.

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# Supreme Court of the United States.

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CENTRAL DISTRICT OF CALIFORNIA.

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## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

Christopher W. Walker respectfully moves that this court permit him to file an amicus curiae brief in support of the claimant-appellee in *United States v. Twelve 200-Foot Reels of Super 8 mm. Film*, No. 70-2. Movant's interest in the case is set forth in section I of the brief filed herewith.

Respectfully submitted,

By his attorneys,

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# Supreme Court of the United States.

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OCTOBER TERM, 1971.

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No. 70-2.

UNITED STATES OF AMERICA,  
*Appellant,*

*v.*

12 200-FT. REELS OF SUPER 8 MM. FILM ET AL.,  
*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
CENTRAL DISTRICT OF CALIFORNIA.

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## AMICUS CURIAE BRIEF IN SUPPORT OF CLAIMANT-APPELLEE.

### Interest of Amicus Curiae.

Amicus Walker's legal rights will be directly affected by the outcome of this action, since he is the claimant of three allegedly obscene magazines against which the government has instituted forfeiture proceedings in *United States v. One Magazine*, D. Mass. Misc. Civ. No. 70-45-F. One of the defenses to the aforesaid forfeiture action is that the three magazines were imported by him for his personal use and hence are privileged against seizure under *Stanley v. Georgia*, 394 U.S. 557 (1969). After initiating the forfeiture action, the government moved that the action against

claimant Walker's magazines be stayed pending this court's clarification of the scope of *Stanley v. Georgia*.<sup>1</sup> The stay was granted over claimant Walker's opposition. It is still in effect and claimant Walker's magazines are still in the hands of the government.

The Solicitor General granted permission to file a brief *amicus curiae* in the instant case on January 4, 1971. Amicus has been unable to reach claimant-appellee Ariel G. Paladini to request permission from him to file an *amicus* brief.<sup>2</sup>

Amicus fears that the following arguments would not receive sufficient development if his brief were not accepted:

(1) That *Stanley v. Georgia*, as a decision protecting an individual's right to harm his own mind if he pleases, conveys an absolute privilege upon mere private possession of obscenity.

(2) That 19 U.S.C. § 1305, though constitutional in its application to commercial importation, is unconstitutionally overbroad in its application to private importation.

Amicus notes that the claimant-appellee is appearing *pro se* in the instant action, and hence *amicus* briefs may be necessary for full development of essential issues.

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<sup>1</sup> The government specifically moved that claimant Walker's case be stayed pending the outcome of *United States v. Various Articles of Obscene Merchandise, Fred Cherry, Claimant*, No. 706 (1969 Term), a case raising a *Stanley v. Georgia* issue substantially identical to the present one. *United States v. Various Articles of Obscene Merchandise* was dismissed on June 23, 1971, pursuant to Rule 60.

<sup>2</sup> Appellee Paladini is appearing *pro se*. Mail sent by amicus to appellee's addresses of record, P.O. Box 451, Sierra Madre, Calif., and 144 East Highland, Apartment F, Sierra Madre, Calif., has been returned marked "moved, left no address."

### Summary of Argument.

*Stanley v. Georgia*, 394 U.S. 557 (1969), creates a sphere of private autonomy which the government may not directly breach to "protect" the individual from reading or observing what he pleases. The government may prohibit commercial distribution, but it may not seize pornography belonging to the ultimate consumer. Mere private possession by an adult for purely personal use is absolutely privileged, at the border no less than in the home.

Even if mere private possession is not absolutely privileged, 19 U.S.C. § 1305(a) is unconstitutionally overbroad because it applies to both privileged and unprivileged forms of private possession. Commercial distributors do not have standing to challenge the overbreadth of § 1305(a), since commercial distribution is a "hard core" violation clearly beyond any constitutional privilege. However, all adults who possess pornography for purely personal use do have standing to challenge § 1305(a), and as to them the statute is unconstitutional.

### Argument.

#### I. THE CONSTITUTION PROHIBITS SEIZURE OF OBSCENITY DISCREETLY IMPORTED BY AN ADULT FOR PERSONAL USE.

*Stanley v. Georgia*, 394 U.S. 557 (1969), conferred a constitutional privilege upon what is characterized as "the mere private possession of obscene matter." 394 U.S. at 559. The *Stanley* court rejected the argument that the state has the "right to protect the individual's mind from the effects of obscenity." 394 U.S. at 565. It noted that there appeared to be "little empirical basis" for the assertion that exposure to obscene materials leads to deviant sexual behavior or crimes of sexual violence, 394 U.S. at 566, and concluded that "[g]iven the present state of knowledge,

the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the the ground that they may lead to the manufacture of home-made spirits." 394 U.S. at 567.

The chief thought behind *Stanley* was that the state had no business prohibiting mere possession of pornography by an individual because of a paternalistic desire to prevent him from harming himself. Thus, *Stanley's* roots are not in the First Amendment's specific provisions for free speech but in the time-honored libertarian doctrine that

"[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their member, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant." J. S. Mill, *On Liberty*, 9 (A. Castell ed. 1947).

These ideals are clearly embedded in American constitutional tradition, and for legal purposes they can be grounded on the due process clause of the Fifth Amendment, on the penumbras of the First, Fourth and Fifth Amendments, or on the Ninth Amendment. See generally *Griswold v. Connecticut*, 381 U.S. 479 (1965).

*Stanley* did not, of course, establish an absolute rule prohibiting states from enacting laws to protect individuals from self-harm. Many such statutes have been passed, and no doubt others will be in the future. Two features of the statute examined in the *Stanley* case made it particularly offensive. First, the statute sought to protect individuals not from physical harm, but from mental harm caused by

receipt of information and ideas. The Court was clearly disturbed by this feature. It characterized *Georgia's* argument as being that states could deal with possession of obscenity

"... just as they may deal with possession of other things thought to be detrimental to the welfare of their citizens. If the State can protect the body of a citizen, may it not ... protect his mind?"

In the course of rejecting this argument, the court emphasized that individuals have a "right to receive information and ideas, regardless of their social worth," 394 U.S. at 564. This language does not carry with it a correlative "right to distribute." It merely reflects the court's belief that direct interference with an individual's autonomous monitoring of his self-regarding conduct is more offensive when the state seeks to prevent him from harming his mind instead of his body. The *Stanley* court's recognition of the right to a zone of personal privacy within which individuals may monitor what they choose to receive mentally is thus not weakened by the court's subsequent holding in *United States v. Reidel*, 402 U.S. 351 (1971), that commercial distributors may be prosecuted and that obscenity is not within the protection of the First Amendment.

Secondly, the statute examined in *Stanley* directly intruded upon the life of the individual, instead of indirectly protecting him by punishing commercial distributors. The *Stanley* court understandably distinguished between commercial distributors and private possessors, thereby conforming to a tradition in American law of regulating self-regarding harm principally by striking at commercial facilitators and abettors, rather than directly interfering with what individuals have chosen to do with their own

minds and bodies.<sup>2</sup> There is absolutely no inconsistency between recognition of an absolute right to purely private possession of obscenity and broad power to prosecute commercial distributors.

The offensive features described in the foregoing paragraphs are just as prominent in the instant case as they were in *Stanley*. Understandably, the government passes over these features and fixes upon the fact that Stanley's pornography was seized in his house. Evidently, in the government's view, an individual may possess obscenity in his home but not in his automobile, his wallet, his luggage, his office desk, his safe deposit box, his mail or any other personal and private places. Such a strange result cannot lightly be accepted, notwithstanding the language in *Stanley* emphasizing the importance of the home. The Constitution does not make the home a medieval sanctuary beyond the law's reach, nor does an individual give up his right to be free from government interference when he steps beyond the threshold. He carries with him a "protective zone ensuring the freedom of [his] inner life, be it rich or sordid." *United States v. Reidel, supra*, 402 U.S. at 360 (concurring opinion of Mr. Justice Harlan).

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<sup>2</sup> For example, distribution of instruments for use in masturbation has been forbidden, e.g., Mass. General Laws, c. 272, § 21, but the act itself has hardly ever been prohibited, despite its supposed harms. See J. Kaplan, *Marijuana—The New Prohibition*, 312 (1970). This approach has been followed by many lawmakers in dealing with other consensual or "victimless" crimes such as gambling, prostitution, abortion or sale of alcohol to minors. Similarly, the government has chosen to require that automobile manufacturers furnish seat belts, even to customers who would not otherwise request them, but it has not required drivers to buckle them. Indeed, the constitutionality of such a requirement would be in doubt. See *American Motorcycle Ass'n v. Davids*, 158 N.W. 2d 72 (Mich. Ct. App. 1968), noted, 82 Harv. L. Rev. 469; *Everhardt v. New Orleans*, 208 So. 2d 423 (La. Ct. App. 1968) (requirement that motorcyclists wear crash helmets unconstitutional).

The government's brief confuses the concept of privacy with the concept of secrecy. *Stanley* was not intended simply to protect an individual from "intrusive inquiry" to determine the nature of materials possessed by him. That goal could have been accomplished simply by prohibiting the government from searching homes for the purpose of discovering pornography. *Stanley* clearly goes beyond that, and prevents the government from prosecuting an individual for possessing pornography at home even if it could do so without the necessity of a search of the home. The "privacy" protected in *Stanley* and *Griswold v. Connecticut* is not a narrow protection of an individual's right to secrecy in certain physical spheres. It is a right to "privacy" in a broader sense—in the sense that an individual has a sphere of private autonomy in which, in dealing with his own thoughts and his own mind, he may be free from direct governmental interference so long as he acts discreetly and does not harm others. The state interferes with this private sphere whenever it seizes obscenity belonging to the ultimate consumer, whether the seizure takes place at home, in transit, or from the mails. Hence, seizure of obscenity from luggage at a border crossing constitutes an unconstitutional interference with "privacy" whether or not the contents are entitled to secrecy.

Finally, the government argues that laws against the distribution of obscenity cannot be effectively enforced if persons are allowed to import obscenity for alleged private use. This argument is essentially the same as the one advanced by the state in *Stanley v. Georgia*, and rejected by the Court:

"[W]e are faced with the argument that prohibition of possession of obscene materials is a necessary incident to statutory schemes prohibiting distribution. That argument is based on alleged difficulties of

proving an intent to distribute or in producing evidence of actual distribution. We are not convinced that such difficulties exist, but even if they did we do not think that they would justify infringement of the individual's right to read or observe what he pleases." 394 U.S. at 567-568.

The government has produced no empirical evidence to demonstrate why it is any more necessary to seize small quantities of obscenity at the border than it is to seize obscenity in the home. *A priori*, there seems to be no reason why would-be distributors of obscenity would be more likely to import obscenity from abroad—thereby creating additional risk of criminal prosecution based on discovery during customs searches—than they would be to manufacture it at home. At any rate, if Congress desires to restrict the private importation of obscenity in order to prevent covert importation for commercial purposes, it should do so in an appropriately limited statute. For example, Congress could provide that importation of more than a certain quantity creates a presumption that the purpose is distribution; it could provide for registration of private importers; it could make a false statement as to the purpose of importation a separate crime; perhaps it could even place the burden of proof as to the purpose of the importation upon the importer rather than the government. There are clearly less restrictive alternatives to the all-inclusive approach of § 1305.

### III. EVEN IF THE GOVERNMENT WOULD HAVE POWER TO SEIZE PORNOGRAPHY IMPORTED FOR PERSONAL USE UNDER AN APPROPRIATELY LIMITED STATUTE, IT MAY NOT DO SO UNDER THE UNCONSTITUTIONALLY OVERBROAD PROVISIONS OF 19 U.S.C. § 1305.

Even if *Stanley* is given a narrow reading, so that it does not even protect the traveler carrying a small quantity

of pornography for personal use, 19 U.S.C. § 1305 would still be unconstitutional in many of its potential applications. Whatever the scope of the protective zone of privacy created by *Stanley*, it must at least cover such items as obscene letters between marital partners, an obscene diary, or an obscene manuscript carried by a traveler in his personal effects. These items could be subject to seizure under § 1305's broad prohibition of any obscene "writing."

Even without the *Stanley* doctrine, § 1305 would clearly be unconstitutional in some of its applications. For example, the statute provides that "the Secretary of the Treasury may, in his discretion, admit the so-called classics or books of recognized and established literary and scientific merit . . ." This clause implies that in the absence of a discretionary act by the Secretary, even books with clear redeeming social value—books with "established literary and scientific merit"—are subject to seizure under the statute. Moreover, § 1305 by its terms prohibits importation of books which lack literary or scientific merit but which are intended for use in legitimate scientific research. Importation of hard core pornography for bona fide research purposes is constitutionally privileged. *United States v. 31 Photographs*, 156 F. Supp. 350 (S.D.N.Y. 1957). Finally, § 1305 is vague and overbroad because it contains a prohibition of "immoral" articles. The concept of "immorality" is undefined and all-embracing, not having received the same judicial definition and delimitation which has been given to the concept of "obscenity."

Because of its overbreadth, § 1305 should be invalidated as it applies to all non-commercial importation of pornography. No readily discernible standard can be evolved in one case which could isolate all of the unconstitutional applications of § 1305. Nor, within any permissible interpretation of the original purpose of the statute, can the statute be restrictively interpreted in one sweep so as to exclude

all possible unconstitutional applications. In these circumstances, the most appropriate judicial treatment of the statute is to hold it unconstitutional. See generally Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 858-863 (1970).

Commercial distributors do not have standing to raise the issue of the overbreadth of § 1305. See *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 377 (1971) (Harlan, J., concurring). Cf. *Dombrowski v. Pfister*, 380 U.S. 479, 491-492 (1965); *United States v. Thirty-Seven Photographs*, *supra*, 375, n. 3. There is no anomaly, however, in holding that § 1305 is void for overbreadth as applied to private importers, but that it may validly be applied to prohibit commercial importation. Commercial distributors are within the "hard core" of persons whose conduct is clearly not constitutionally privileged. The line between commercial and non-commercial speech activities is easily understood and well established. Compare *Breard v. Alexandria*, 341 U.S. 622 (1951) and *Jones v. Opelika*, 316 U.S. 584 (1942), with *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) and *Martin v. Struthers*, 319 U.S. 141 (1943). See *Valentine v. Chrestensen*, 316 U.S. 52 (1942). Holding that commercial importers may not challenge the overbreadth of § 1305 would therefore have no substantial "chilling effect" upon persons who are constitutionally privileged to import obscenity, since such persons can easily distinguish between commercial and non-commercial importation. In contrast, no easily understood *per se* rule is available which would enable persons affected by § 1305 to distinguish between privileged and non-privileged forms of non-commercial importation. Whatever constitutional standard this court adopts, the issue of whether a given private importation is privileged will turn upon a host of variables. Individuals desiring to import obscenity would be unable to predict whether their conduct would be lawful

or unlawful. Therefore, the statute should be held completely invalid as it applies to non-commercial importation. See generally Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 907-910 (1970). If Congress desires to prohibit some forms of non-commercial importation, it should do so in an appropriately limited statute. Congress is better equipped to promulgate a detailed, comprehensive set of rules establishing bright-line tests of privilege than is this Court, which must necessarily proceed by case-by-case adjudication.

The approach urged in the foregoing paragraph is similar to the one which has been followed by this court in its review of "Green River" ordinances prohibiting door-to-door solicitation. Such ordinances have been held invalid *in toto* as applied to non-commercial solicitation, even though some forms of non-commercial solicitation are not constitutionally privileged. At the same time, "Green River" ordinances have been held enforceable as applied to commercial solicitors.<sup>4</sup>

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<sup>4</sup>"The analysis in . . . *Breard v. Alexandria*, 341 U.S. 622 (1951)] . . . suggests that when a law covering both commercial and noncommercial canvassing is held bad 'on its face' it ought not necessarily follow that the law thereafter is unenforceable. If cut back to its commercial applications, the law would be shorn of substantial overbreadth—though at the cost of sparing some unprotected 'noncommercial' activity—and also would be fairly predictable in its permissible operation. See Note, *The Void-for-Vagueness Doctrine in the Supreme Court* [109 U. PA. L. REV. 67], 103n. 190. Absent fair warning problems, laws invalidated at the suit of a 'noncommercial' complainant—for example, the prohibition of anonymous pamphleteering condemned in *Talley v. California*, 362 U.S. 60 (1960)—might perhaps still be applied with respect to commercial messages." Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 909-910, n. 258 (1970).

**Conclusion.**

For the reasons stated above, the court should hold that importation of pornography by adults for personal use is constitutionally privileged, and affirm the judgment below.

Alternatively, the court should hold that 19 U.S.C. § 1305 is unconstitutionally overbroad as applied to adults who import obscenity for personal use, and affirm the judgment below.

Respectfully submitted,

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IN THE  
Supreme Court of the United States

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No. 70-2  
\_\_\_\_\_

Supreme Court, U.S.

FILED

DEC 15 1971

E. ROBERT SEAVER, CLERK

UNITED STATES OF AMERICA,  
*Appellant,*

v.

12 200-FT. REELS OF SUPER 8 MM. FILM *et al.*,  
*Appellees.*

\_\_\_\_\_  
ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE CENTRAL DISTRICT OF CALIFORNIA

\_\_\_\_\_  
BRIEF OF AMICUS CURIAE IN SUPPORT  
OF THE JUDGMENT BELOW

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*Amicus Curiae*

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# Supreme Court of the United States

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No. 70-2

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UNITED STATES OF AMERICA,  
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12 200-FT. REELS OF SUPER 8 MM. FILM *et al.*,  
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE CENTRAL DISTRICT OF CALIFORNIA

---

BRIEF OF AMICUS CURIAE IN SUPPORT  
OF THE JUDGMENT BELOW

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## INTEREST OF AMICUS CURIAE

The claimant-appellee appeared *pro se* in the proceeding below. He has made no appearance in this Court. On October 12, 1971, this Court invited the undersigned to brief and argue this case, as *amicus curiae*, in support of the judgment below.

## QUESTION PRESENTED

Whether 19 U.S.C. 1305(a), prohibiting importation of obscene material, is unconstitutional as applied to seizure of obscene material in the possession of an individual returning from abroad, when such material is intended solely for his private use.

## STATEMENT

On April 2, 1970, customs officials at Los Angeles Airport, after a customs search, seized certain motion picture films and printed materials found in the possession of Mr. Ariel G. Paladini, an American citizen returning from travel abroad. On April 9, 1970, the United States filed a Complaint, in the United States District Court for the Central District of California, for forfeiture of the seized material. The Complaint alleged that the material was subject to seizure and forfeiture under 19 U.S.C. 1305(a).

On April 27, 1970, the District Court entered an Order of Dismissal, before Answer. The District Court's decision is unreported. (A. 5). The Decision below was based on a Three-Judge Court decision in *United States v. Thirty-Seven (37) Photographs*, Civil No. 69-2242-F, 309 F. Supp. 36 (C.D. Calif.) holding that 19 U.S.C. 1305(a) was unconstitutional on its face. *Thirty-Seven (37) Photographs* was reversed, 402 U.S. 363, rehearing denied, 403 U.S. 924.

In a Motion for a Stay in the District Court, the United States advised the court that it had "no evidence with which to contradict Mr. Paladini's affidavit [that the films were intended solely for his personal use] and, therefore does not contest the fact that this was a private importation." (A. 7). Whether the items seized are obscene has not been determined. Their obscenity is assumed for purposes of argument, in view of the dismissal before answer or trial.

Probable jurisdiction was noted on June 21, 1971. (A. 17).

## SUMMARY OF ARGUMENT

In *Stanley v. Georgia*, 394 U.S. 557, the Court decided that the First Amendment is transgressed when an individual is punished for possession for private use of obscene material in his own home.

The Court held that to punish such possession would be repugnant to the First Amendment, because it would intrude Government into the private thoughts of an individual, and into his right to read and observe privately what he pleases.

That principle would be equally offended by punishing a person for possession of such material for private use when re-entering the United States from abroad. This is far different from the case of a person returning from abroad with such material in his possession which he intends to sell or otherwise use commercially.

The validity of customs inspection, like the validity of a search pursuant to warrant in *Stanley v. Georgia*, is not at issue. The right to make such inspection or search does not foreclose the question of what constitutionally may be seized during the course of a valid inspection or a valid search. It would be anomalous to permit forfeiture of material, the possession of which cannot constitutionally be punished, where the intent is that it remain private.

In addition, if 19 U.S.C. 1305(a) were applied to importation of obscene material for private use, it would have a chilling effect on the right to receive non-obscene material.

*Stanley v. Georgia* also teaches that the First Amendment right to read or observe what one pleases, a right, "so fundamental to our scheme of individual liberty" (394 U.S. at 568), may not be restricted on the basis of an alleged need to ease the administration of otherwise valid laws, state or federal, dealing with obscenity.

## ARGUMENT

THE JUDGMENT BELOW SHOULD BE AFFIRMED. SECTION 1305(a) OF 19 U.S.C. IS UNCONSTITUTIONAL FOR OVERBREADTH BECAUSE, BY PERMITTING CUSTOMS SEIZURE OF MATERIAL INTENDED FOR HIS PERSONAL USE, AND WHICH ACCOMPANIES AN INDIVIDUAL ON HIS RE-ENTRY TO THE UNITED STATES, IT WOULD EFFECTIVELY DIMINISH A PERSON'S RIGHT TO READ OR OBSERVE WHAT HE PLEASES

It is well settled that a statute whose broad sweep prohibits acts of expression which may not be proscribed, as well as those which legitimately may be proscribed, is overbroad and in violation of the First Amendment. *Keyishian v. Board of Regents of New York*, 385 U.S. 589, 609. Section 1305(a) of 19 U.S.C. is overbroad. It would prohibit importation of obscene material regardless of use. It is therefore unconstitutional as applied to importation for private use.

### I

THE FIRST AMENDMENT'S PROHIBITION AGAINST PUNISHMENT FOR POSSESSION OF OBSCENE MATERIAL FOR PRIVATE USE IS NOT LIMITED TO POSSESSION IN THE HOME

In *Stanley v. Georgia*, the state sought to support conviction of the defendant under a state statute prohibiting the possession of obscene material. The material consisted of three reels of motion picture films found by agents of both the United States and Georgia in the defendant's bedroom, during a search pursuant to warrant, for illegal bookmaking articles. The reels were viewed in the defendant's living room by use of a projector found in the house. The Georgia agent concluded the films were obscene and seized them. Thereafter, defendant was indicted and convicted for possession of the films. There was no evidence in the record that the officers had abandoned their search for bookmaking

paraphenalia at the time they viewed the films. It is possible that the films were viewed to determine whether bookmaking transactions were recorded thereon, as counsel for Georgia suggested during oral argument before this Court. (Transcript of Argument, *Stanley v. Georgia*, p. 24, January 14, 1969). In any event, the silence of the trial record on this point permits no inference that the authorized search for bookmaking paraphenalia had been abandoned or that an unauthorized search for other articles had begun.

*Stanley v. Georgia*, it appears, did not turn on the reasonableness of the search and seizure involved. The case is necessarily bottomed on the freedom of speech and press guaranteed by the First Amendment, a guaranty recognized in *Stanley v. Georgia* as rooted in two fundamental, but separate, rights.

First, the Court stated, "It is now well established that the Constitution protects the right to receive information and ideas." (394 U.S. at 563). The Court cited as examples cases involving the right to receive door-to-door religious solicitations, *Martin v. City of Struthers*, 319 U.S. 141, 143; the right to receive medical advice on contraception, *Griswold v. Connecticut*, 381 U.S. 479, 482; the right to receive communist political propaganda, *Lamont v. Postmaster General*, 381 U.S. 301, 307-308 (Brennan, J., concurring); and the right of parents to choose schools where their children will receive appropriate training, *Pierce v. Society of Sisters*, 268 U.S. 510.

The Court concluded that "this right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society" (394 U.S. at 564), citing *Winters v. New York*, 333 U.S. 507, 510, a case involving an obscenity prosecution.

Second, the Court explained that in the context of the prosecution for "mere possession of printed or filmed matter in the privacy of a person's own home" a separate and distinct constitutional right was involved, "for also fundamental is the right to be free, except in very limited circum-

stances, from unwanted governmental intrusions into one's privacy." (394 U.S. at 564).

The existence of that right—"the right to be let alone"—the Court traced from Justice Brandeis' dissent in *Olmstead v. United States*, 277 U.S. 438, 478; from the protection of privacy in marital relations, *Griswold v. Connecticut*, 381 U.S. at 482, and from the right to privacy in one's personal associations referred to in *NAACP v. Alabama*, 357 U.S. 449, 462.

Thus, the Court was concerned with two great constitutional freedoms, the right to receive information and ideas regardless of their social worth, and the right to be free of government intrusion into one's privacy.

Appellant argues that *Stanley* protects material only where privately possessed within the home. But *Stanley* cannot be so artificially constricted. The First Amendment right to receive information is not and should not be confined to receiving it in the home. The information received in *Society of Sisters* was in the schools, and the information received in *Griswold* was at a birth control center. Nothing in *Lamont* suggests that mail is protected only when addressed to one's dwelling place.

The First Amendment right of privacy is not restricted to the home. The dissent of Justice Brandeis in *Olmstead*, referred to in *Stanley*, regarded that right as embracing privacy "in the home, in an office, or elsewhere . . ." (277 U.S. at 477). The privacy referred to in *NAACP v. Alabama* was one of personal association clearly unlimited to the confines of the dwelling place. It would be strange if an individual could be punished for possessing material for private use discovered in the pocket of his overcoat, or in his briefcase as he took one step beyond the threshold of his home, or if the material were discovered in his office cabinet, or in the trunk of his automobile.

Moreover, under the Fourth Amendment, privacy in the home is neither more nor less protected than privacy out-

side the home. As this Court said in *Hoffa v. United States*, 385 U.S. 293, 301:

What the Fourth Amendment protects is the security a man relies upon when he places himself or his property within a constitutionally protected area, be it his home or his office, his hotel room or his automobile. There he is protected from unwarranted governmental intrusion. And when he put something in his filing cabinet, in his desk drawer, or in his pocket, he has the right to know it will be secure from an unreasonable search or an unreasonable seizure. (Footnote omitted).

Similarly, in *Katz v. United States*, 389 U.S. 347, 351-52, the Court said:

For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

The dwelling place therefore is no search-proof haven for illegally possessed articles. Warrants issued on probable cause, defining with particularity the subject matter of the search, may be executed in the home, for example, for narcotics, *Jones v. United States*, 362 U.S. 257, for stolen articles, *Rugendorf v. United States*, 376 U.S. 528, and for illegal whiskey distilleries, *United States v. Ventresca*, 380 U.S. 102. There is no reason to suppose that pursuant to proper warrant, law officers could not inspect books in a home to determine whether wagering transactions were recorded in the margins of say, Edgar Allen Poe's *The Purloined Letter*. Thus, the right of privacy in the home implies no preferred position for the home over any other private place, insofar as the scope of searches is concerned.

Nothing in *Roth v. United States*, 354 U.S. 476, or in *United States v. Reidel*, 402 U.S. 351, is inconsistent with the rights of privacy described in *Stanley*. *Roth*, decided before *Stanley*, upheld a conviction for use of the mails to distribute

obscene materials commercially. *Reidel* also upheld the constitutionality of a federal statute prohibiting knowing use of the mails for the delivery of obscene matter for commercial purposes. *Reidel* and *Roth* dealt with public distribution of obscene material. The case at bar does not. *Reidel* and *Roth* did not deal with one's constitutional right to decide what he intends to read or to view privately. The case at bar deals with nothing else.

*Stanley* holds: "Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." (394 U.S. at 566). It makes clear that a person's constitutional freedom of speech and press " 'necessarily protects the right to receive.' " (394 U.S. at 564).

That is far different from *Reidel*'s assertion of a right to sell obscene material and to distribute it. As this Court said in *Reidel*: "The personal constitutional rights of those like *Stanley* to possess and read obscenity in their homes and their freedom of mind and thought do not depend on whether the materials are obscene or whether obscenity is constitutionally protected. Their rights to have and view that material in private are independently saved by the Constitution." (402 U.S. at 356).

The exercise of a man's constitutional right to read or to observe, in private, whatever he wishes, makes the subject matter of what he reads or observes irrelevant. To hold otherwise would be to endorse governmental thought control. It is only when the individual determines to forego his constitutional privacy, and to disseminate his material—whatever it may be—in public, by sale or otherwise, may the state begin to have a basis for a constitutional interest in the subject matter of that material.

On the same day that this Court decided *Reidel*, it also decided *United States v. Thirty Seven (37) Photographs*. In *Thirty Seven (37) Photographs*, claimant Luros, who returned from abroad with 37 photographs which were seized by cus-

toms, stipulated that he intended to use some or all of the photographs in a book to be printed for commercial distribution. The District Court had held the statute, 19 U.S.C. 1305(a), unconstitutional on procedural grounds as well as on substantive grounds. The plurality opinion of this Court said that the District Court's decision on substantive grounds may have been reached either, (a) because it believed Luros had a right to import the photographs for "planned distribution to the general public," or (b) because it believed, under *Stanley* that a person would have a right "to import them for his own private use and that § 1305(a) was therefore void as overbroad because it prohibits both sorts of importation. If this was the [District] court's reasoning, the proper approach, however, was not to invalidate the section in its entirety, but to construe it narrowly and hold it valid in its application to Luros." (402 U.S. at 375 n. 3).

The statute was construed by this Court to apply constitutionally to *Thirty-Seven (37) Photographs*, which was, by stipulation, a case of importation for commercial purposes. It was not a case involving importation for private use.

Nevertheless, the plurality opinion said (402 U.S. at 376): "Whatever the scope of the right to receive obscenity adumbrated in *Stanley*, that right, as we said in *Reidel*, does not extend to one who is seeking, as was Luros here, to distribute obscene materials to the public, nor does it extend to one seeking to import obscene materials from abroad, whether for private use or public distribution."

Justice Stewart, concurring, stated: "I would not . . . decide, even by way of dicta, that the Government may lawfully seize literary material intended for the purely private use of the importer." (402 U.S. at 379). Justice Harlan, concurring, said that he "would hold that Luros lacked standing to raise the overbreadth claim." (402 U.S. at 378).

The case at bar, unlike *Thirty Seven (37) Photographs*, squarely presents the question of importation for private use. Fundamentally, it is the intent with which a person imports a book or film which must be controlling. It may well be that a person's constitutional right to think, or to read or to see, must give way to the constitutional authority of the state to prohibit or control, if he in truth does not seek to exercise private rights, but, to the contrary, intends to sell material or to distribute it in public. But so long as what material he has, he intends to keep to himself in a personal or private way, he should be protected against the state, either because of *Stanley* or because of what *Stanley* foreshadows. And the fact that what he possesses (ever intending to keep it private) may rest in his luggage on his return from abroad affords no basis to deny him his constitutional right of privacy.

## II

### THE RIGHT OF PRIVATE POSSESSION IS NOT INCONSISTENT WITH THE GOVERNMENT'S RIGHT OF CUSTOMS INSPECTION

The validity of customs inspection is not in question here. The most thorough searches can be viewed as necessary to ascertain what articles are being imported, whether and to what extent they are dutiable, and whether they may lawfully be imported.

Nor is it questioned that customs officials may require a declaration from the importer as to the intended use of the imported material. For example, household effects of persons returning from living abroad are duty-free, so long as the effects were actually used abroad by the importer or his family, for not less than one year, and the effects are not intended for any other person, or for sale (19 U.S.C. 1202, Item 810.10). The customs collector relies on "a declaration of the owner on customs Form 3297" as to the availability of duty-free treatment for household effects.

(19 C.F.R. 10.11). Customs regulations (19 C.F.R. 10.12) provide that "the required use of the effects abroad for 1 year must be proven to the satisfaction of the Collector who may, in his discretion, require evidence other than the declaration of the applicant."

Additionally, for persons entering the United States after residence abroad, duty-free treatment is afforded their personal possessions other than household effects. This treatment also depends on the person's intent. (19 U.S.C. 1202, Items 810.10-828.00).

And, in accordance with *United States v. Thirty-Seven (37) Photographs*, since obscene materials intended for commercial use may be excluded, inquiry can be made as to the intention of an importer of allegedly obscene material.

Likewise, intent of the importer is a relevant factor under the *proviso* of 19 U.S.C. 1305(a), the very statute before the Court in this case. By that *proviso*, the Secretary of the Treasury may admit "the so-called classics or books of recognized and established literary or scientific merit, but may, in his discretion, admit such classics or books only when imported for noncommercial purposes." See *United States v. One Book Entitled Ulysses*, 72 F.2d 705 (2d Cir. 1934).

Thus, the fact that customs officers may not detain obscene material intended for private use in no way impedes the making of searches, the imposition of duties, and the seizure of obscenity intended for commercial use.

### III

IF 19 U.S.C. 1305(a) WERE APPLIED TO IMPORTATION OF OBSCENE MATERIAL INTENDED FOR PRIVATE USE, THERE WOULD BE A CHILLING EFFECT ON THE RIGHT TO IMPORT NON-OBSCENE MATERIAL.

Obscenity is a complex concept. The obscene is "material which deals with sex in a manner appealing to prurient interest." *Roth v. United States*, 354 U.S. at 487. A book as a whole must be judged by that measure (*Id.* at 489-490), and the prurient interest appealed to must be that of normal adult persons, not the young or the immature, or the highly prudish (*Id.* at 490). In any event, if a work reflects "ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion" (*Id.* at 484), the work has constitutional protection.

Under this definition, "as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description of representation of sexual matters; and (c) the material is utterly without redeeming social value." *A Book v. Attorney General*, 383 U.S. 413, 418.

As this Court observed in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66, "constitutionally protected expression . . . is often separated from obscenity only by a dim and uncertain line." As stated in *Speiser v. Randall*, 357 U.S. 513, 525, "the line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn."

A traveler who desires to comply with the law relating to obscene materials will hardly be able to make comfortable judgments as to the location of that "dim and uncertain line" before purchasing books or films abroad which he

intends to bring home for private use. Moreover, he will hardly be comforted by the thought that he may be able to keep his purchased property only after litigating the matter in the Federal Courts.

The returning traveler who is not a commercial importer and who does not desire to import obscene materials as he is making his purchases abroad, has a right to be free from such risks under the First Amendment.

The difficulties attending an individual who desires to import books or films for private use increase in the case of mail orders from catalogues and advertisements. Such a person would at best have difficulty in anticipating on which side of the "dim and uncertain line" the material he wishes to order might fall. If the title or description of the work suggests that it might possibly have an appeal to a prurient interest, that fact alone could deter him from ordering the work, out of apprehension of possible seizure and ensuing litigation.

The application of 19 U.S.C. 1305(a) to imported material intended for private use would therefore have a severely chilling effect on the individual's right to import non-obscene materials—an effect which cannot be squared with the principle enunciated by this Court in *Freedman v. Maryland*, 380 U.S. 51, *Teitel Film Corp. v. Cusack*, 390 U.S. 139 and *Blount v. Rizzi*, 400 U.S. 410. As the Court held in *Freedman*, and reiterated in *Teitel* and *Blount*, to avoid the constitutional infirmity of prior restraint on non-obscene material, a scheme of censorship must place the burden of instituting judicial proceedings, and of proving that the material is unprotected expression, on the censor, and must require prompt judicial review.

That principle would be reduced to insignificance if residents of the United States are put in fear of seizure of constitutionally protected works by the expectation that their private books and films may be seized and judicially proceeded against, at points of entry.

It would be no answer that only small amounts of material would be seized because an individual would be unlikely to bring home more than a few books or films for his private use. Indeed, the prior restraint is the more aggravated by that fact, because of the disproportionate expense of conducting litigation involving the seizure of an occasional book or film. In addition, there would be reluctance on the part of the individual to suffer the attendant publicity of defending against a charge by his government that he had imported obscene material. The prior restraint would therefore be all the more pervasive and insidious because it would fall with special harshness on a large number of ordinary individuals.

#### IV

#### PROHIBITION OF IMPORTATION FOR PRIVATE USE CANNOT BE JUSTIFIED AS AN INCIDENT TO ENFORCEMENT OF OTHER ANTI-OBSCENITY LAW

Appellant argues that if importation for private use is constitutionally protected, the enforcement of valid anti-obscenity laws would be "seriously undercut." *Stanley* provides the complete rebuttal:

Finally, we are faced with the argument that prohibition of possession of obscene materials is a necessary incident to statutory schemes prohibiting distribution. That argument is based on alleged difficulties of proving an intent to distribute or in producing evidence of actual distribution. We are not convinced that such difficulties exist, but even if they did we do not think that they would justify infringement of the individual's right to read or observe what he pleases. Because that right is so fundamental to our scheme of individual liberty, its restriction may not be justified by the need to ease the administration of otherwise valid criminal laws. (394 U.S. at 567-68).

Aside from the fact that prosecutorial convenience is no warrant for diluting liberties protected by the Constitution, Appellant's argument lacks factual support. There is only speculation that a right to private importation might lead to abuse so substantial as to undercut enforcement of valid laws. Indeed, the importation of a large quantity of material, by itself, can give rise to an inference that its intended use is not private, but is commercial, notwithstanding the importer's declaration.

When that case arises in which the Government determines that it should go to trial upon the facts, a showing that multiple copies of a particular piece of matter are sought to be imported by the same person should raise an extremely strong inference against any claim that the material is sought for allegedly scientific purposes. (*United States v. 31 Photographs*, 156 F. Supp. 350, 360 (S.D.N.Y. 1957)).

Enforcement of anti-obscenity laws provides neither constitutional or practical justification for the abridgement of one's constitutional right to import material for private use.

## CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1971

Supreme Court, U.S.  
FILED

JAN 17 1972

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No. 70-2

UNITED STATES OF AMERICA,

*Appellant,*

—v.—

TWELVE 200-FOOT REELS OF SUPER 8 MM. FILM, *et al.*,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 70-69

UNITED STATES OF AMERICA,

*Appellant,*

—v.—

GEORGE JOSEPH ORITO,

*Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WISCONSIN

**BRIEF OF THE AMERICAN CIVIL LIBERTIES  
UNION, AMICUS CURIAE**

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WISCONSIN

---

**BRIEF OF THE AMERICAN CIVIL LIBERTIES  
UNION, AMICUS CURIAE**

## Interest of *Amicus*\*

The American Civil Liberties Union is a nationwide non-partisan organization of over 160,000 members dedicated solely to preservation of the liberties safeguarded by the Bill of Rights. During its fifty-one year existence the ACLU has particularly been concerned with protecting the First Amendment guarantees of freedom of speech and press. While our original concern was with efforts to restrict political expression, we have long maintained that all forms of speech and writing, including "obscenity", are presumptively entitled to blanket constitutional protection.

These cases involve important questions concerning the constitutionally proper reach of two federal statutes regulating obscenity. Although this Court has upheld broad congressional power in this area, these statutes encompass prohibitions which are unrelated to legitimate governmental interests. It is our purpose to suggest that the Court identify and limit those goals which such legislation should pursue.

## Introduction and Summary of Argument

These cases involve challenges to two federal statutes which respectively proscribe under any circumstances the importation of obscene materials, 19 U.S.C. Section 1305 and the transportation of such materials in interstate commerce by common carrier, 18 U.S.C. Section 1462. The

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\* Letters of consent from the Government and from counsel for Appellee Orito to the filing of this brief have been filed with the Clerk. It is our understanding that efforts to communicate with the claimant-appellee in No. 70-2, Arial Paladini, who is appearing *pro se*, have been unsuccessful, and, accordingly that the Court has appointed Thomas Kuchel, Esq., as special *amicus curiae* in support of the judgment below.

analytical issue to be resolved is at which point on the continuum between the holding of *Stanley v. Georgia*, 394 U.S. 557 (1969), that the mere private possession and use of obscenity cannot be interdicted, and the more recent rulings in *United States v. Reidel*, 402 U.S. 351 (1971) and *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971), reaffirming that the commercial distribution of obscenity may continue to be proscribed, is the line of constitutional protection to be drawn.

The decision in *Stanley v. Georgia* contained the potential for redirecting this Court's obscenity doctrines away from an emphasis on the content of the expression and toward an analysis of the governmental interests advanced by the particular statutory arrangement. For the first time this Court held that an adult could possess and peruse obscenity in the privacy of his home without interference by the state. Based on this premise, various lower federal courts ruled that statutes which proscribed mere possession of obscenity under all circumstances were defective because they were not limited to pursuing those goals which *Stanley* suggested were valid. E.g., *Stein v. Batchelor*, 300 F. Supp. 602 (N.D. Tex. 1969, 3-judge court), *vacated on other grds.*, sub nom. *Dyson v. Stein*, 401 U.S. 200 (1971); *United States v. Various Articles of "Obscene" Merchandise*, 315 F. Supp. 191 (S.D.N.Y. 1970, 3-judge court), *prob. juris. noted*, 402 U.S. 971, *dism. per Rule 60*, 403 U.S. 942 (1971); *United States v. Dellapia*, 433 F.2d 1252 (2d Cir. 1970).

In *Reidel* and *Thirty-Seven Photographs* the Court dealt with federal obscenity statutes from the perspective at the opposite end of the mere possession/commercial distribution spectrum. In *Reidel*, the majority opinion, relying on *Roth v. United States*, 354 U.S. 476 (1957), upheld the gen-

eral validity of 18 U.S.C. Section 1461 as applied to commercial distributors who disseminate obscene matter through the mails. A plurality opinion in *Thirty-Seven Photographs* upheld the ban on importation of obscene materials as applied to items which the importer ultimately intended for public commercial distribution. While these two cases may have been correctly decided in light of their commercial contexts, their narrow reading of the principles of *Stanley v. Georgia* tends to inhibit a more traditional First Amendment analysis of obscenity legislation. Cf. *United States v. Various Articles of "Obscene" Merchandise, supra*.

In any event, the two statutes challenged here are susceptible of application in a variety of circumstances which are much more closely assimilated to the use and possession afforded protection by *Stanley* than to the commercial distribution model to which *Roth*, *Reidel* and *Thirty-Seven Photographs* pertain. For example, Section 1305 by its terms can be utilized to prevent an adult from legally purchasing a pornographic novel in Scandinavia and bringing it home in his suitcase, for its ultimate destination in his library. Similarly, Section 1462 theoretically prevents a person from taking an obscene book in his brief case on a business trip if he rides on a common carrier. Even if *Stanley* is read as a decision relying primarily on concepts of privacy, as the government contends, its protection does not cease at a man's front door, for the right of privacy "protects people, not places". *Katz v. United States*, 389 U.S. 347, 351 (1967). Rummaging a man's suitcase to inquire what literature satisfies his emotional needs is analytically no less intrusive of privacy than rifling his closets for the same purpose.

Since both statutes are capable of reaching a substantial range of conduct protected under the principles of *Stanley*, including the conduct of these appellees, they are defectively overbroad. With regard to Section 1305, the Court should announce a *per se* rule that it cannot validly be applied to essentially private importation of obscenity. See *United States v. Various Articles of "Obscene" Merchandise*, *supra*; Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844 (1970). Deferring to a case-by-case adjudication of its validity will, in effect, mean that the statute's broad reach will go unchallenged. For similar reasons, Section 1462 should be invalidated as overbroad.

## ARGUMENT

### I.

**The rationale of *Stanley v. Georgia* is applicable to the private use and possession of obscene material by adults in any setting.**

The government's theory in these cases is that *Stanley v. Georgia* is a decision essentially, if not exclusively, vindicating the interests of privacy in the home. But *Stanley* was both argued and decided primarily as a First Amendment case. The language, analysis and conclusions of the opinion were premised on protecting freedom of thought. *Stanley* argued that a statute which "punishes mere private possession of obscene matter violates the First Amendment," and the Court agreed. 394 U.S. at 559. In reaching this conclusion, the Court distinguished most of its previous obscenity decisions as having dealt with "use of the mails to distribute objectionable material or with some form of public distribution or dissemination." *Id.* at 561.

But where possession of such material for private enjoyment is concerned, different interests are involved. The Court specifically rejected Georgia's contention that it could nevertheless "protect the individual's mind from the effects of obscenity," *id.* at 550, characterizing the assertion as a claimed right to thought control, offensive to the principles of the First Amendment.

To be sure, the intrusion into Stanley's home was a factor in the decision. But this element was "an added dimension" reinforcing, though not limiting, the "right to receive information and ideas, regardless of their social worth. . . ." *Id.* at 564. And if the First Amendment means that the government may not control men's minds by telling a person sitting alone in his own home what he may read, *id.* at 565, then it is difficult to understand what principled reasons would allow the same intrusion elsewhere. Even reading *Stanley* as essentially a privacy decision, the right of privacy has been held to protect "people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967); *Dellapia v. United States*, 433 F.2d 1252 (2d Cir. 1970). To limit the decision to the confines of one's home is to return to the doctrine of "constitutionally protected areas" abandoned in *Katz*. The businessman who takes an obscene book from his library, carries it in his brief case, reads it in his hotel room and thereafter returns it to his home should be protected from governmental intrusion throughout his journey; his First and Fourth Amendment interests do not significantly change throughout that time. The traveler returning from abroad with a similar book intended for his library should be entitled to the same protection. If these situations are not constitutionally protected, then as Mr. Justice Black noted, *Stanley* simply sustains a man "who writes salacious books in his attic, prints them in his base-

ment, and reads them in his living room." *United States v. Thirty-Seven Photographs*, *supra* at 28 L. Ed.2d 837 (dissenting opinion).

That *Stanley* meant more than this was recognized by many of the lower federal court decisions which followed it. Based on *Stanley's* analysis of the kinds of interests which could sustain obscenity legislation, various courts invalidated legislative arrangements which by their reach impinged upon interests which *Stanley* had held to be protected. E.g., *Stein v. Batchelor*, 300 F. Supp. 602 (N.D. Tex. 1969, 3-judge court), *vacated on other grds.*, sub nom. *Dyson v. Stein*, 401 U.S. 200 (1971); *United States v. Various Articles of "Obscene" Merchandise*, 315 F. Supp. 191 (S.D. N.Y. 1970, 3-judge court), *prob. juris. noted*, 402 U.S. 971, *appeal dismissed per Rule 60*, 403 U.S. 942 (1971); *United States v. Dellapia*, 433 F.2d 1252 (2d Cir. 1970).

In *United States v. Dellapia* a prosecution was brought under 18 U.S.C. Section 1461 for the private mailing of obscene films. Viewing *Stanley* as having written "a new chapter" in obscenity analysis, the Second Circuit focused on the governmental interests being advanced by the particular prosecution. Since none of the interests subsumed within the concept of "public distribution" were infringed by the defendant's conduct, the reasoning of *Stanley* was controlling:

The privacy that *Stanley* protects is the privacy of confidential communication or the privacy of being let alone if the communication does not harm others, not privacy in any other aspect. In *Stanley* the Court protected the "confidential communication" between a solitary viewer and a dirty movie or the right to be let alone with that movie—no matter how abhorrent the

film may have been. \* \* \* It would be anomalous to prevent consenting adults from freely passing among themselves obscene material which *Stanley* tells us each of them was entitled to possess and view or read. 433 F.2d at 1258.

Concluding that the defendant's conduct was protected, the Court construed the statute's "broad prohibition as subject to an underlying requirement that the mailing trespass upon a valid governmental interest which constitutionally justifies invasion of a private consensual relationship . . ." 433 F.2d at 1260.

Similarly, *United States v. Various Articles of "Obscene" Merchandise*, *supra* involved a challenge to the customs statute as applied to a person who sought to import single items for his own private use. Summing up the cases from *Roth* to *Stanley*, Circuit Judge Moore concluded that "orthodox First Amendment considerations are once again of paramount importance, *Roth* notwithstanding, even where the publications in issue are concededly obscene." 315 F. Supp. at 195. Finding no valid interests served by preventing the importer from receiving single copies of such publications, the court concluded that the broad prohibition of Section 1305 was unconstitutional as applied to importation for private use and enjoyment.

Such interpretations of *Stanley* are of continued vitality notwithstanding the Court's more recent decisions in *Reidel* and *Thirty-Seven Photographs*. Both of those decisions upheld the broad federal prohibition on mailing or importing obscene materials in the context of actual or intended commercial distribution. *Reidel* involved the application of Section 1461 to those who "are routinely disseminating ob-

scenity through the mails" and can make no claim about intrusions into the privacy of their home. 28 L. Ed.2d at 817. The majority opinion reasoned that Stanley's right to peruse obscene material in his home did not imply Reidel's right to sell it to him. *Thirty-Seven Photographs* involved application of Section 1305 to an importer who intended to incorporate those photographs into a book for commercial distribution. While a plurality of the Court felt that the statute could validly encompass private importation, the premises of the decision was the validity of a ban on importation in the commercial context. Neither of the two rulings is inconsistent with the reasoning and analysis in *Stanley* which are of continued relevance.<sup>1</sup>

## II.

The statutes at issue are unconstitutional because they encompass a variety of situations and contexts where the possession of obscene materials is protected under the principles of *Stanley v. Georgia*.

Section 1305 contains a blanket prohibition on the importation of obscene material regardless of the context or the intended use. Section 1462 similarly proscribes the transportation of such materials by common carrier. These two statutes are capable of application in a variety of situations where the possession of obscene materials can be as-

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<sup>1</sup> For example, in *United States v. Various Articles of "Obscene" Merchandise*, the court anticipated the majority view in *Thirty-Seven Photographs* by refusing to invalidate Section 1305 on its face and extending the decision "beyond the statute's application to the importation of obscene matter for purposes other than commercial dissemination" 315 F. Supp. at 197. Similarly, *Reidel* could have been decided the same way even under the kind of analysis of interests employed in *Stanley*. See, *The Supreme Court, 1970 Term*, 85 Harv. L. Rev. 3, 233, n. 30 (1971).

simulated to the area of protection enunciated in *Stanley v. Georgia*, and accordingly are defectively overbroad.

#### A. Section 1305

The reach of the customs statute was best described by Justice Stewart,

The terms of the statute appear to apply to an American tourist who, after exercising his constitutionally protected liberty to travel abroad, returns home with a single book in his charge, with no intention of selling it or otherwise using it. If the Government can constitutionally take the book away from him as he passes through customs, then I do not understand the meaning of *Stanley v. Georgia*. . . . *United States v. Thirty-Seven Photographs*, *supra*, 28 L.Ed.2d at 835 (concurring opinion).

The government does not raise a strenuous challenge to Justice Stewart's analysis, but instead offers various justifications for sustaining the statute in all of its applications.

First, the government argues that since individuals can be prevented from importing obscene materials by mail, even though intended for private use, then it would be "odd" to allow a right of importation for those who personally purchase obscene materials abroad. But we challenge the premise that *Thirty-Seven Photographs* and *Reidel* preclude a right of private importation by mail. When an adult in this country requests and receives an obscene book from a distributor abroad, the actual sale of the book does not offend state or federal law, and its receipt for private use is protected. Moreover, while there is no mechanism to interdict domestic mail to determine

whether it is obscene and whether the recipient wishes to receive it, the government does claim and exercise the right to examine mail matter from abroad and thus has the opportunity to make these inquiries to determine whether the importation infringes valid interests. Finally, even assuming that private importation by mail can be prohibited, it is still not "odd" at least to allow such importation when effected personally. If the traveler described by Justice Stewart is entitled to the protection of *Stanley's* principles, then that protection should not be withheld simply because the statute can validly be applied to other methods of private importation. In the First Amendment area, where precise tools are required and least drastic alternatives preferred, the odd phenomenon is an argument that a statute validly applicable to most situations should be held constitutional in all instances.

Second, the government contends that upholding a right of private importation would yield no measurable gain for the privacy of individuals.<sup>2</sup> But the power to regulate foreign commerce, like the power over the mails, cannot be utilized to enhance the government's substantive capacity to infringe on First Amendment interests. See *Lamont v. Postmaster General*, 381 U.S. 301, 305 (1965); *Hiatt v. United States*, 415 F.2d 664 (5th Cir. 1969); *United States v. 18 Packages of Magazines*, 238 F. Supp. 846, 848 (N.D. Cal. 1964). The fact that a returning traveler must surrender certain privacy and submit to a luggage search for

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<sup>2</sup> The argument is partly based on an excessive assertion of the government's power to search at the border, see *United States v. Johnson*, 425 F.2d 630 (9th Cir. 1970), *cert. granted*, 400 U.S. 990, *dismissed per Rule 60*, 30 L. Ed.2d 35 (1971), and also premised on a continuing characterization of obscenity as though it were contraband, an attitude which cannot survive *Stanley's* holding.

smuggled diamonds or dutiable items does not justify the confiscation of an obscene book. The interests identified in *Stanley* protect against rummaging through a traveler's mind, not his luggage. The gravamen of the harm is telling a man he may not read or import the book because it may stimulate salacious thoughts. The damage is in surrendering the book, not submitting it for inspection intended to determine whether it contains narcotics or dirty pictures. The seizure of an obscene book is just as repugnant to constitutional values as the confiscation of Communist literature. Cf. *Lamont v. Postmaster General*, *supra*.

Third, the government resurrects an argument rejected in *Stanley*, namely, that it may prohibit importation of obscenity for private use in order to vindicate its interests in regulating public, commercial distribution. This Court was not concerned with the problem of "tracking" Mr. Stanley's film, and there should be no such concern here. There are narrower alternatives available to the government to accomplish valid goals. A variety of simple criteria and methods can be utilized to insure that the material is intended for the individual's own use. Customs officials can make a brief inquiry and solicit a response under oath.<sup>3</sup> The quantity of material could give rise to a presumption of commercial intent.<sup>4</sup> Finally, even if there is a small amount of fraudulently imported obscenity, it should be

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<sup>3</sup> Such a procedure would involve no added inconvenience to customs officials who now have to administer the seizure provisions. With regard to mail importations, customs officials now notify the addressee of the seizure and request assent to forfeiture. They would simply have to draft a new letter.

<sup>4</sup> In New York, like other states, one who possesses six or more identical or similar obscene articles is presumed to have an intent to sell them. N. Y. Penal Code, Section 235.10(2). See also, ALI Model Penal Code, Tent. Draft No. 6, Section 207.10(5).

remembered that a book or film which is admitted into this country (even those held not to be obscene) must nevertheless face an array of other federal and local barriers. Compare *United States v. A Motion Picture Film Entitled "I Am Curious-Yellow,"* 404 F.2d 196 (2d Cir. 1968) with *Karalexis v. Byrne*, 306 F. Supp. 1363 (D. Mass. 1969, 3-Judge court), *vacated on other grounds*, 401 U.S. 216 (1971) (involving the same film).

Finally, the substantial and, we submit, constitutionally required distinction between importation for private purposes and importation for commercial distribution is even reflected in a portion of the statute and in the administrative practice under it. Indeed, Section 1305 itself affords the Secretary discretion to admit the "so-called classics or books of recognized and established literary or scientific merit," when imported for *non-commercial purposes*. Though any such book would presumably never be found obscene because it possesses redeeming social value, nevertheless "the line between commercial and other importations extends a distinction to which the Congress was sensitive when it enacted Section 305". *United States v. Various Articles of "Obscene" Merchandise*, *supra* at 197. Similarly, even the Bureau of Customs recognized that "the passenger having in his luggage a single copy of a picture, book or magazine acquired abroad for his own use and not for resale, presents a special problem" and urged its inspectors to give such individuals "the benefit of any doubt in determining whether 'hard-core pornography' is involved". Bureau of Customs Circular, RES-15-PEN, January 15, 1964.

**B. Section 1462**

This statute contains defects of overbreadth similar to those found in the customs prohibition. It interdicts a wide variety of instances where an individual is in possession of obscene material under circumstances which entitle him to invoke the protection of *Stanley v. Georgia*. We do not wish to duplicate the analysis of this statute's overbreadth contained in appellee Orito's brief. We would, however, suggest that the proper principle for deciding these cases is as follows:

... the protection granted to the possession of pornography in the home ought to be extended to all situations involving mere private possession by an adult. So long as the material is meant simply for private use of the individual and is not likely to be circulated, he retains a privacy interest regardless of his location and there seems to be no contrary state interests beyond those found insufficient in *Stanley*. *The Supreme Court, 1970 Term*, 85 Harv. L. Rev. 3, 236 (1971).

## III.

**The Court should declare now that these statutes are unconstitutionally overbroad.**

We have argued that both statutes can be employed in a variety of instances where the possession of obscene material should be protected by the principle of *Stanley v. Georgia*, i.e., possession assimilated to personal use and enjoyment. If the Court agrees that these statutes are substantially overbroad, then two alternatives are available, either declare the statutes facially void or create a rule of First Amendment privilege based on the distinction between commercial and other uses of obscenity. Section 1305 is amenable to the latter approach, Section 1462 requires invalidation on its face.

In *Thirty-Seven Photographs*, the customs statute was upheld as applied to commercial importation. The issue here is importation for private, noncommercial use. But a variety of situations are encompassed within that concept. Whether or not the Court upholds the judgment below, other private importers will not know precisely what range of valid application the statute has in terms of quantity of materials, mail as opposed to personal importation, and the like.

Such uncertainty is particularly unfortunate with regard to Section 1305 whose primary effect is felt on individuals who seek to import isolated single copies of magazines or books for their own perusal.<sup>8</sup> First, there are severe venue

<sup>8</sup> For example, in the Southern District of New York the practice is to engage in "multiple seizures," i.e., dozens or hundreds of items intended for a similar number of separate importers are proceeded against in one complaint. In 1968, 2988 separate pack-

problems, since the statute mandates that forfeiture proceedings be brought in the district of the seizure, not where the addressee or importer resides. Second, there are cost burdens of traveling to that district and/or retaining counsel. Few private importers will be willing to assume these costs and burdens in order to litigate their right to a single book or magazine. Indeed, the entire system appears to be premised on the expectation that few will challenge the censor's decision. It is ironic that only those with a profit motive, i.e., the commercial importer, will have the interest in challenging the administrative determination for procedural or substantial defects, while those who claim constitutional protection under *Stanley* will be unable to vindicate their rights. Self-censorship will be the result.

Enunciating a broad rule excising private importation from the operation of the statute will avoid these uncertainties. The distinction between commercial and other activity with regard to obscenity is sensible, has a basis in the statute and its history, has been utilized in other First Amendment contexts and conforms to judicial policies which govern the operation of the overbreadth doctrine. See *United States v. Various Articles of "Obscene" Merchandise*, *supra*, 315 F. Supp. at 196-97; *United States v. New Orleans Bookmart*, 328 F. Supp. 136 (E.D. La. 1971); see generally, Note, *The First Amendment Overbreadth Doctrine*, *supra* at 921.

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ages belonging to approximately 2000 different claimants were subject to forfeiture actions. Only three of those persons filed an answer. See Cross-Jurisdictional Statement in *Various Articles of "Obscene" Merchandise v. United States*, O.T. 1970, No. 778, *app. dismissed*, 400 U.S. 935 (1970) at pp. 8-10. It is our understanding that recently there has been some increase in the number of private claimants who have filed letter-answers to the forfeiture proceedings.

The overbreadth considerations applicable to Section 1462 are somewhat different. It too is susceptible to a wide range of unconstitutional applications, as the appellee's brief in No. 70-69 indicates. By virtue of the "continuing offense" designation, there are venue burdens similar to those presented by Section 1305. See *Reed Enterprises v. Clark*, 278 F. Supp. 372 (D.C. D.C. 1967), *aff'd mem.*, 390 U.S. 457 (1968). Moreover, this statute does not readily lend itself to a distinction between commercial and other forms of transportation. Unlike Section 1305, it does not have an implicit sensitivity to such a distinction for certain purposes. Cf. *United States v. Various Articles of "Obscene" Merchandise*, *supra* at 196-97. Nor is there any background of administrative recognition of such differing interests. Cf. Bureau of Customs Circular, RES-15-PEN, *supra*. There is no administrative mechanism such as a customs inspection which affords the opportunity to draw the line. Finally, given the continued vitality of Section 1461, and the existence of state laws regulating obscenity, the potential harm from an interregnum statutory gap, should Section 1462 be invalidated, would be minimal.

## CONCLUSION

For the reasons set forth above, the judgments should be affirmed.

Respectfully submitted,

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in the  
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of the  
**United States**

OCTOBER TERM, 1970

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**No. 70-2**

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**UNITED STATES OF AMERICA,**

*Appellee,*

*vs.*

**TWELVE 200' REELS OF SUPER 8mm FILM,**

*Appellant.*

---

**On Appeal from the District Court for the  
Central District of California**

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**Motion for Leave to File Untimely Amicus Curiae Brief  
and to Participate in the Oral Argument by  
Joel Hirschhorn, Esq., as Amicus Curiae  
in Support of Appellant.**

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in Support of Appellant.

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Joel Hirschhorn, Ralph J. Schwarz, Jr., and Mel S.  
Friedman, Esqs., Amici Curiae in behalf of Appellant  
respectfully move that leave be granted to Joel Hirschhorn

to participate in the oral argument as amicus curiae in support of Appellant. A brief amici curiae by the said Joel Hirschhorn, Ralph H. Schwarz, Jr., and Mel S. Friedman, Esqs., on behalf of Appellant, has heretofore been filed with the court with the consent of the Solicitor General.

1. The interest of amici in this case arises from the fact that they are counsel in a profusion of cases, in Federal and State courts throughout the United States involving the same constitutional issue before the court in this case, namely, whether it is constitutionally permissible for a State to punish the dissemination of allegedly obscene material to adults, in the light of the free speech and press, due process and equal protection provisions of the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

2. The First Amendment Lawyers' Association is an informal organization comprised of approximately seventy-five attorneys who participate extensively in First Amendment litigation involving literally thousands of cases throughout the United States in both State and Federal courts.

3. Amici believe that oral argument will provide assistance to the court, not otherwise available. The formulation of standards and criteria, relative to the dissemination of material dealing with sex and nudity to adults, by the court, involves considerations reaching beyond the particular concrete situation presented in the case herein. There is need for the court to know, it is submitted, the operation and effect of obscenity statutes

and their impact upon the exercise of freedoms of speech and press by the adult community throughout the United States. Oral argument would offer the opportunity to present to the court essential facts, important data, and empirical evidence, as well as a summary of diversified experiences which bear importantly upon the substantial constitutional question presented to the court. The argument would inform the court with respect to the chilling effect of obscenity statutes upon the circulation of constitutionally protected material to adults. There is also probative data available that obscenity statutes for adults necessarily lend themselves to arbitrary, discriminatory and selective enforcement. The information and evidence which amicus is prepared to furnish the court on oral argument will, it is submitted, be fruitful, illuminating and helpful to the court in determining the substantial constitutional issue presented in the case.

4. The instant brief of amici curiae is not timely due to the following facts:

a. The decision to write a brief as amici curiae was made after the respective due date of counsel of records' brief;

b. Due to the press of numerous other trial and appellate matters the undersigned amici were unable to complete this brief timely;

c. This brief and motion is filed in good faith and with the intention of aiding this court in resolving the urgent and vital issues presented to the court.

**WHEREFORE**, amici respectfully pray that the Motion for Leave to File Untimely Brief as amicus curiae be granted, and the Motion for Leave to Participate in the Oral Argument by Joel Hirschhorn, as amicus curiae, likewise be granted, and that the court allot such time for oral argument as may seem proper.

**DATED:** October 2, 1972.

**Respectfully submitted,**

---

**Joel Hirschhorn, Amicus Curiae**

**Ralph J. Schwarz, Jr., Amicus Curiae**

**Mel B. Friedman, Amicus Curiae**

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 6th day of October, 1972, copies of the above and foregoing were mailed, postage prepaid, to all attorneys of record; I FURTHER CERTIFY that all copies required to be served herein have been served.

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**JOEL HIRSCHHORN, Amicus Curiae**

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in the  
**Supreme Court**  
of the  
**United States**

OCTOBER TERM, 1970

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**No. 70-2**

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**UNITED STATES OF AMERICA,**

*Appellee,*

*vs.*

**TWELVE 200' REELS  
OF SUPER 8mm FILM**

*Appellant.*

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**On Appeal from the District Court  
for the Central District of California**

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**Joel Hirschhorn, Esq., Ralph J. Schwarz, Jr., Esq., and  
Mel S. Friedman, Esq., on behalf of The First  
Amendment Lawyers' Association, as Amici  
Curiae in Support of Appellant.**

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Joel Hirschhorn is a member of the bar of the State of Florida and of the United States Supreme Court. He has been involved in litigation in both Federal and State courts involving the issues presented by this Amici Curiae Brief.

In accordance with the rules of the Court, consent to the filing of a Brief Amici Curiae was sought from the Court appointed counsel for the Appellant, and also from the U.S. attorney for the Central District of California. Court appointed counsel for the Appellant indicated he could not grant nor deny permission in view of the fact that this Court has Ordered further Oral Argument, but had not requested additional Briefs. The Solicitor General of the United States has consented to the filing of an Amicus Curiae Brief herein.

Mr. Hirschhorn has associated with him on this Brief Ralph J. Schwarz, a member of the bar of this Court and of the bar of the State of New York. Mr. Schwarz is presently involved in litigation in both Federal and State courts involving the same issues presented here.

Also associated on this Brief is Mel S. Friedman, a member of the bar of the State of Texas and of the United States Supreme Court. Mr. Friedman has also been involved in litigation in both Federal and State courts involving the same issues presented here.

Messrs. Hirschhorn, Schwarz, and Friedman have prepared and presented this Brief on behalf of the First Amendment Lawyers' Association which consists of approximately seventy-five (75) attorneys practicing law

throughout all State and Federal courts in the United States and who deal primarily with First Amendment and related issues.

Amici have attempted to limit the issue presented to a narrow issue dealing with a right of adults to receive materials under the First Amendment. A brief historical review of the development of the First Amendment is presented in order that the Court can properly view the complex question of the protection of the First Amendment in light of the historical development of this right. Considerable reference is made to The Report of the Commission on Obscenity and Pornography prepared pursuant to Public Law 90-100 and published by the United States Government Printing Office, Washington, D.C.

## ARGUMENT

WHETHER, UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION, AN ADULT, PREVIOUSLY FOREWARNED, HAS THE ABSOLUTE RIGHT TO BUY, SELL, RECEIVE, WRITE, PUBLISH, DISTRIBUTE, DISSEMINATE AND/OR EXHIBIT HARD CORE PORNOGRAPHY AND OBSCENE MATERIAL TO OTHER PREVIOUSLY FOREWARNED ADULTS PROVIDING THERE IS NO ASSAULT OR INTRUSION UPON THE SENSIBILITIES OF OTHER NON-INTERESTED ADULTS, NO PANDERING, NOR JUVENILE INVOLVEMENT?

A. HISTORICALLY THE FIRST AMENDMENT PROTECTS PORNOGRAPHY AND OBSCENITY.

The Amici contend that historically the First Amendment to the United States Constitution was never intended to deny protection to pornography and obscenity. In short the *Roth-Alberts* conclusion that "obscenity is not within the area of constitutionally protected speech or press," 354 U.S. 476, 485 (1957), is historically incorrect. Like Mr. Justice Douglas, see *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), 428-433 (concurring opinion, Mr. Justice Douglas), Amici contend that "obscenity" was not an established exception to the First Amendment guarantee of Free Speech and Press when the Bill of Rights was adopted in 1791.

During the fight for ratification of the United States Constitution it became apparent that many prominent colonialists were deeply troubled by the apparent sweeping powers of the new Federal Government. These concerns were met when, led by James Madison, twelve proposed amendments were approved by Congress in September, 1789. Ten of these were ratified by the individual States and on December 15, 1791, the "Bill of Rights" became part of the United States Constitution. It is significant to note that at the time of the enactment of these amendments:

1. Only one colony, Massachusetts, had a statute prohibiting "intemperance, immorality and profaneness", which was enacted in 1711; the first State statute prohibiting commercial distribution of obscenity was enacted in Vermont in 1821; the first Federal statute, was enacted in 1842.

2. Lumped together with religion, Freedom of Speech was clearly intended to be as absolute as the right of one to choose his own form of religious worship.

3. The mandatory language of the First Amendment, like that of the other nine amendments, make it clear that absent overwhelming justification, the Freedoms of Religion, Speech, Assembly and Petition are absolute.

4. Only specific, narrow exceptions to these limitations on the powers of the new Federal Government would be permitted, such as criminal libel, and the Alien and Sedition Acts. The reports of the First Congressional debates regarding these proposed amendments are ap-

parently incomplete but inference is clear that the Bill of Rights was intended to curb and not extend Federal (i.e. Governmental) Powers, see Kronvitz, **Fundamental Liberties of a Free People: Religion, Speech, Press, Assembly**, pp. 345-361 (1957).

5. The First Amendment guarantee of Freedom of Speech and Press was designed to insure absolute freedom from governmental control of the newspaper and publishing industry in general, and was not intended as a proscription against obscenity or pornography because the publication of such material was not a secular crime at Common Law in 1791, see Point C, *infra*.

Thus it is clear that the **Roth-Alberts**, *supra*, conclusion of obscenity is not protected is incorrect, and ought to be reversed.

#### **B. OBSCENITY PER SE FALLS WITHIN THE PROTECTION OF THE FIRST AMENDMENT.**

As stated, **Roth v. U.S.**, *supra*, held that obscenity was outside the protection of the First Amendment based on premises stated in that decision which Amici submit on reconsideration are not constitutionally valid for either the several States or the Federal Government. Indeed, it is submitted there is no valid justification for the automatic exclusion from First Amendment protection of a form of expression called obscenity. In fact, and law, there are compelling reasons consistent with the First Amendment why it should not be excluded. Moreover, where the exercise of First Amendment rights is claimed to be abridged, it is the function of this Court to weigh the

circumstances and appraise the substantiality of the reasons advanced in support of such laws and regulations, *Thornhill v. Alabama*, 310 U.S. 88, 95, 96 (1940). By obscenity *Amici* refer, of course, to the material itself or the obscenity *per se* on the assumption that the mode of commercial distribution is such that only a willing, consenting adult, who has been previously forewarned of the contents is the purchaser or viewer. While the justifications advanced for the automatic exclusion of obscenity tend to overlap they break themselves generally into three categories.

The first justification for claiming that obscenity is outside the pale of the First Amendment stems from the fact that laws regulating profanity, blasphemy and criminal libel had been deemed, especially in the early stages of the formation of the Union, to be outside the protection of the First Amendment. The essential rationale underlying the justification for excluding such utterances from First Amendment protection, as set forth in *Beauharnais v. Illinois*, 343 U.S. 250, 256, 257 (1952), and *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942), is that "fighting words" which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace. By dicta, habit and automation stemming, undoubtedly, from a lack of any real need to focus on the issue, obscenity was always linked with the profane and libelous utterance. However, the rationale for the automatic exclusion of the profane and criminally libelous utterance has been seriously undermined and essentially overruled recently in *Ashton v. Kentucky*, 384 U.S. 195 (1966), *Cohen v. California*, 403 U.S. 15 (1971), *Cantwell v. Connecticut*, 310 U.S. 296 (1940). Hence, the justification for the automatic exclusion of obscenity must

fall. Moreover, assuming any justification for the automatic exclusion of criminal libel, a libel does inflict injury because it is false and is not any step in the search for truth because the libel by its very nature is false. A picture of a man and woman engaged in coitus when viewed by one who wants to view it does not inflict any injury on the viewer and is not per se false.

The second justification for the automatic exclusion of the obscene is the erroneous assumption that the First Amendment protects only the expression of ideas, connoting an intellectual communication. The First Amendment however, protects every expression and communication be it for purposes of entertainment, amusement, or fulfillment of a person's intellectual or emotional needs, and regardless of its worth, and is not limited just to the expression of an idea, *Winters v. New York*, 333 U.S. 507, 510 (1948), *Hannegan v. Esquire*, 327 U.S. 146 (1946), see also 72 Y.L.J. 877, 879 (1962).

The third apparent justification is that the viewing of obscenity leads to anti-social conduct and illegal behavior, and has an adverse impact on personality, and an adverse moral impact. There is virtually no scientifically accepted empirical data that obscenity or pornography lead to any crimes of sexual violence or other anti-social behavior as this Court has already recognized, *Stanley v. Georgia*, 394 U.S. 557, at 566 nt 9 (1969). Indeed, the data collected shows no causal relationship between "obscenity" and any criminal conduct, see generally Report of President's Commission on Obscenity and Pornography and Point D, *infra*.

The argument that obscenity has an adverse moral impact serves to emphasize the fact that obscenity does indeed convey ideas (although presumably bad), otherwise there would be no objection to it.

## 1. THE PROFANE AND LIBELOUS FIGHTING WORDS EXCEPTION.

As stated above the automatic exclusion of obscenity as being outside the penumbra of the First Amendment sought to be justified is by analogy to the exclusion of the profane and the libelous. Recently, however, the premise underlying *Chaplinsky, supra*, has been denounced and there is now no justification for the exclusion of the so-called "obscene".

In *Cohen v. California, supra*, the defendant was convicted of violating a section of a California Penal Code which prohibited maliciously and willfully disturbing the peace and quiet of any neighborhood or person by offensive conduct. The defendant's conduct consisted of wearing a jacket in a Los Angeles, California, Courthouse which bore the words "Fuck the Draft". In common parlance, these words would certainly be considered profane and vulgar and as the Court observed, 403 U.S. 20, words "not uncommonly employed in a personally provocative fashion". Despite the fact that these words are generally regarded as profane, vulgar and used as an insult, the Court held the conviction could not stand on the grounds that while the use of the words was inherently likely to cause violent reaction, it was not shown that the words were directed at any one, and that the phrase in question

demonstrated defendant's feelings. The case also demonstrates a clear reversal of the *Chaplinsky* principle.

In *Ashton v. Kentucky*, 384 U.S. 195 (1966), the petitioner was convicted for committing the common law crime of criminal libel. This Court held the statute in question unconstitutional and reversed the defendant's conviction. In doing so, this Court relied in great part on cases involving breach of the peace offenses and especially *Cantwell v. Connecticut*, 310 U.S. 296 (1940), *Cantwell* was convicted for breach of the peace for playing a phonograph record, in a public place, which attacked religion and the Catholic church in general. When a listener objected *Cantwell* left. In *Cantwell*, *supra* at 309, this Court pointed out that provocative language amounting to a breach of the peace has almost always consisted of "profane, indecent or abusive remarks directed to the person of the hearer". In short then, this Court has recognized in the case of the profanity and the criminal libel that it is not just a matter of the public utterance of the words *per se* but rather whether the words are directed at a particular hearer under circumstances where he cannot avoid them.

The profane and the criminal libel are not therefore just automatically excluded from First Amendment protection. The States do not have the power to regulate such utterances or the basis that they are automatically outside the protection of the First Amendment. The presumption then that the so-called obscene is automatically excluded from First Amendment protection must likewise fall, for the justification for the automatic exclusion of obscenity has stemmed from the automatic exclusion of utterances which are *ipso facto* profane or libelous.

Moreover, it is hard to understand the rationale for the conclusion that the obscene and profane is outside the First Amendment except that historically they had been erroneously linked and that the "obscene" was bad and, therefore, deemed an insult. In addition, there is even less basis for the automatic exclusion of the "obscene" where purchased or viewed by a consenting forewarned adult. There is absolutely no basis to conclude that such utterances could inflict injury on such a consenting adult.

Amici's position is strengthened by two recent decisions of this Honorable Court, *Gooding v. Wilson*, 405 U.S. 518 (1972), and *Rosenfeld v. New Jersey*, \_\_\_\_ U.S. \_\_\_\_, 33 L.Ed.2d 321 (1972). In *Rosenfeld*, *supra*, this Court vacated and remanded appellant's conviction under a New Jersey statute prohibiting the use of profane or indecent language in a public place in light of *Gooding*, *supra*, and *Cohen*, *supra*. In *Rosenfeld*, *supra*, appellant had used the phrase "Mother Fucker" on four separate occasions to describe the teachers, school board, the town, and the United States of America, at a public school board meeting attended by about 150 people, 25 of whom were minors, and 40 of whom were women (and thus presumably sensitive to such language). Even dissenting Justice Powell recognized, however,

But our free society must be flexible enough to tolerate even such a debasement provided it occurs without subjecting unwilling audiences to the type of verbal nuisance committed in this case, 33 L.Ed.2d at 324.

## 2. THE FIRST AMENDMENT PROTECTION IS NOT LIMITED TO THE EXPRESSION OF IDEAS AND FURTHER OBSCENITY CONVEYS IDEAS.

This Court has recognized that the First Amendment is not limited to the exposition of only popular ideas but covers expressive matter commercially distributed even though it is entertaining or vulgar, *Winters v. New York*, supra, 335 U.S. 507, 510 (1948), *Hannegan v. Esquire*, 327 U.S. 146, supra. In *Cohen v. California*, supra, 403 U.S. at 26 this Court recognized that an expression conveys "not only ideas but otherwise inexpressible emotions as well".

While the search for the truth through ideas is one very critical basis for the First Amendment, it is not the only basis. Clearly, the First Amendment protects non verbal expression, see 72 Yale L.J. 877, 879, (1962).

The justification for excluding obscenity on the assumption that the First Amendment protects only the written or verbal expression of an idea is therefore not accurate. Furthermore, this question of whether even obscene expressive utterances (or publications) are to be excluded on the grounds that such material conveys no ideas itself refutes one of the justifications for excluding obscenity. 79 Yale Law Journal 209, 211, 212, (1969-70).

One of the basis for excluding obscenity is allegedly that it has a harmful moral impact and leads to the disintegration of the moral fibre. Assuming this to be a justification (though it is not) obscenity could not have such an impact unless it did indeed present ideas and

stimulate argument and debate. 79 Yale Law Journal 211, 212, 216, (1969-70).

We live in a highly mobil, fragmented society with woman's equality a foregone conclusion, if not yet a reality. The role of sex in society is a critical one. The presentation of the so-called obscene forces people to reevaluate their own attitudes on this subject. In fact, even the so-called obscene aids in the never ending search for the truth. The so-called obscenity reflects in major part a change in attitudes about sex and is one factor which helps people to evaluate and reevaluate their ideas and attitudes about the roles of men and women and sex attitudes in our ever changing society. The notion that obscenity does not convey an idea is simply not true, 79 Yale L. J. at 215, 216. If pornography did not convey ideas there would be no murmur (much less the hue and cry), about its presentation to consenting adults.

### 3. THERE IS NO CASUAL RELATIONSHIP BETWEEN PORNOGRAPHY AND HARMFUL CONDUCT.

As stated, this Court has already recognized that there is little, if any empirical evidence that obscenity induces crimes of sexual violence, *Stanley v. Georgia*, supra. There is no scientific basis for a presumption that it induces violent conduct or crimes of any kind and governmental studies have shown the contrary, see the Report of the Commission on Obscenity and Pornography, supra.

Thus, this Court has stated:

Criminal statutory presumptions must be regarded as irrational or arbitrary and hence unconstitutional unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend, *Leary v. United States*, 395 U.S. 6, 89 S.Ct. 1532, 1548 (1969).

Of course, the most widely recognized exception to the First Amendment is where the exercise of the Freedom of Speech and/or Press results in or creates a "clear and present danger" to society or some segment thereof, *Schenck v. United States*, — U.S. —, 39 S.Ct. 247 (1919). That is, will the exercises of the First Amendment in the manner under review, "bring about the substantive evils that Congress has a right to Prevent"? As asserted in *Schenck*, supra, this question is one of "proximity and degree".

In light of the conclusions of the extensive studies, (i.e. the Report of the Commission on Obscenity and Pornography), done at Presidential request and governmental expense, how can it be argued that obscenity and pornography is not entitled to the protection of the First Amendment? Assuming the conclusions of the Report to be true, even hard core pornography has no harmful impact on the recipient and thus creates no "clear and present danger". It follows therefore that there is no constitutional justification for the continued governmental repression and suppression of sexually oriented material.

This conclusion is even further strengthened by this Court's holding that:

The Government "thus carries a heavy burden of showing justification for the imposition of such a [i.e. prior] restraint". *New York Times Company v. U. S. [Pentagon Papers Case]* — U.S. —, 91 S.Ct. 2140 (1971).

Neither the States nor the Federal Governments can sustain justifying prohibiting forewarned consenting adults from buying, selling, receiving, writing, publishing, distributing, disseminating or exhibiting obscene materials to other consenting forewarned adults.

### C. WHETHER FOREWARNED CONSENTING ADULTS HAVE THE ABSOLUTE RIGHT TO ENJOY FOR THEIR OWN PRIVATE PERSONAL ENTERTAINMENT AND/OR DESIRE HARD CORE PORNOGRAPHY AND OBSCENITY.

The rights guaranteed by the Constitution or otherwise are not absolute rights in the sense that they entitle a citizen to act in any way he pleases. Rather he must exercise his rights in such a way that the rights of others are not denied. . . . Honorable Sam J. Ervin, Jr. (D., N.C.) "Layman's Guide to Individual Rights Under the United States Constitution," 3rd Ed. (Government Printing Office, Washington, D. C., 1972).

Assuming, arguendo, Senator Ervin's remarks that constitutional rights are not absolute, to be true, it is clear that so long as one's private acts do not disparage the rights of others, this right (of privacy) is absolute. And, if this Court accepts the conclusions of the Report of the Commission on Obscenity and Pornography, *infra*, then a forewarned consenting adult has the absolute right to receive for his (or her) own private enjoyment or entertainment, or use, even hard core sexually oriented material of the most depraved and foul nature imaginable, *Stanley v. Georgia*, 394 U.S. 557 (1969). Of course, this absolute right to receive under the protective penumbra of the First and Ninth Amendments, *Griswold v. Connecticut*, 381 U.S. 479 (1965), is meaningless unless some other adult (individual or corporate) has the absolute right to offer for sale or exhibition the materials necessary to meet this right receive, *U. S. v. Langford*, 315 F.Supp. 193, (Minn. 1970), and *U. S. v. Lethe*, 312 F.Supp. 421 (Cal. 1970).

Amici's position stated simply is that:

1. The right to buy, receive, write, publish, distribute, disseminate, sell, or exhibit hard core pornographic and obscene material was protected, at Common Law, from secular courts.

2. The Ninth Amendment to the Constitution protects and preserves for the people all rights they enjoyed prior to the enactment of the United States Constitution.

3. Present case law protects and preserves private sexual acts of consenting adults.

4. Both the Fourteenth Amendment equal protection of the laws clause and *Stanley v. Georgia*, supra, protects the right to receive and the collateral right to sell or exhibit hard core pornography and obscene materials provided of course there is no pandering, juvenile involvement, nor intrusion upon the sensibilities of unwilling adults. Amici will treat each of these four arguments separately.

1. THE COMMERCIAL PUBLICATION, DISTRIBUTION, SALE AND/OR EXHIBITION OF OBSCENE MATERIAL WAS NOT A CRIME, AT COMMON LAW, PUNISHABLE BY SECULAR COURTS.

The crime of publishing, distributing, selling, and/or exhibiting obscene material is of recent vintage. Some eighty-three (83) years prior to the enactment of the First Amendment, the Star Chamber held in a *per curiam* opinion, that:

A crime that shakes religion (a), as profaneness on the stage, & c. is indictable (b); but writing an obscene book, as that entitled "The Fifteen Plagues of a Maidenhead," FPM, is not indictable but punishable only in the Spiritual Court (c). *Queen v. Read*, Case No. 205, Michaelmas Term, 6 Queen Anne, S.C., 2 Stra. 789, 11 Mod. Rep. 142 (1708).

Subsequent British Decisions punished, initially, "obscene libel", *King v. Curl*, 2 Stra. 788 (1727); but it was not until 1824 that a statute was enacted in England permitting secular prosecution for a public exposure of ob-

scene material, 5 Stat. Geo. 4, C. 83. Thus, at the time of the enactment of the Ninth Amendment, obscenity, (i.e., eroticism sans blasphemy), was not a crime in England.

Moreover, only one colony, Massachusetts, had a statute prohibiting commercial obscenity prior to 1791, (this statute was entitled "an act against intemperance, immorality, and profaneness, and in reformation of manners"). The other colonies left the question of obscenity to the Spiritual Courts. The first state to enact a statute prohibiting commercial distribution of obscenity was Vermont in 1821, Laws of Vermont, 1824, Ch. XXIII, No. 1, Section 23. And, it was not until twenty-one (21) years thereafter that Congress enacted its first law prohibiting the introduction of obscene material into the United States, 5 U.S. Stat. 566 (1842).

The Report of the Commission on Obscenity and Pornography, at page 297-298, traces the history of the merger of religious profaneness, blasphemy and obscenity. The conclusion is inescapable that when Read, supra, was acquitted in 1708 for writing the sexually obscene book, "The Fifteen Plagues of a Maidenhead", because the book libeled no one, did not attack the Government of England, and was not blasphemous, the matter was one best left to the "Spiritual Court".

The Ninth Amendment of course provides that:

The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

In essence, the Ninth Amendment means that whatever rights the people had at Common Law were retained by the people despite the ratification of the United States Constitution in 1789. The next step then is both logical and simple. If, at Common Law, a person had the right to write, without being punished, a sexually obscene book, *c.f. Read, supra*, then this right survived the enactment of the United States Constitution and the Amendments thereto. It is elemental that statutes in derogation of Common Law are to be strictly construed. Thus the assumption that "obscenity is not protected," is erroneous and must fall.

## 2. THE NINTH AMENDMENT RIGHT OF PRIVACY PROTECTS AND PRESERVES THE RIGHT TO RECEIVE, OR VIEW, EVEN HARD CORE PORNOGRAPHY.

The Ninth Amendment, does not, per se, grant "substantive" rights. Rather, this, until recently little understood, Amendment preserves a basic right of man, the right of privacy. While at one time there appeared to be a great disagreement as to precisely what the Ninth Amendment meant, Garvey, *Unenumerated Rights—Substantive Due Process*, the Ninth Amendment, and John Stuart Mill, 1971 Wisc. L. Rev. 992, 928-932, this Court's opinion in *Griswold v. Connecticut*, 381 U.S. 479 (1965), may well have laid the intellectual and academic debate to rest.

In essence, *Griswold, supra*, held that the right of privacy, "between consenting married adults", is protected against State invasion, by the First Amendment when read with the other Amendments. The "penumbra

of rights" elucidated in *Griswold*, has of course been reaffirmed, most recently by this Court in *Eisenstadt v. Baird*, \_\_\_ U.S. \_\_\_, 92 S.Ct. 1029 (1972). The question of whether this "right of privacy" is absolute or not is answered simply by the observation that individual liberties ought to be limited only when they are in conflict with the rights of others, *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1952); and after all, that is precisely the proposition for which *Redrup v. New York*, *infra*, stands.

*Stanley v. Georgia*, *supra*, makes it clear that a man's home is the private castle in which he may, for his own personal wishes, enjoy hard core pornography. The "right of privacy" is more than a physical dwelling, however, it is the "privacy of thought," pure or otherwise, provided no one else is harmed. Our democracy functions, in large part, because we enjoy freedom of thought and access to even unpopular ideas. The Ninth Amendment protects this right. This Court must preserve that right and make it meaningful. If *Rich Stanley*, *supra*, has his right of privacy, so must everyman.

### 3. THE PRIVATE, SEXUAL ACTS AND CONDUCT, OF FOREWARNED ADULTS, ARE PROTECTED UNDER THE FIRST, FIFTH, NINTH AND FOURTEENTH AMENDMENTS.

It is not the function of our laws to impose a moral code; moreover, no immoral conduct, no matter how reprehensible ought to be a basis for a criminal law unless the conduct is harmful to others, or self-destructive. The manner in which an adult conducts his own private affairs in life is his own personal matter. This right to be free

has been articulated by Mr. Justice Brandis in his now famous dissenting opinion in *Olmsted v. United States*, 277 U.S. 438 (1928), quoted with approval in *Stanley v. Georgia*, *supra*:

The makings of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure, and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. They conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men. [Emphasis added.]

This right to be free has of course been expanded considerably since *Griswold*, *supra*, which of course dealt with the right of married adults to receive birth control devices and/or counseling; c.f. *Eisenstadt*, *supra*, which declared unconstitutional a Massachusetts statute which permitted married persons to obtain contraceptives to prevent pregnancy, but prohibited distribution of contraceptives to single persons for the same purposes. This Court in *Eisenstadt*, *supra*, went on to assert that:

If the right of privacy means anything, it is the right of individual, married or single, to be free from unwarranted Governmental intrusion into matters so fundamentally affecting a person as their decision whether to bear or beget a child. See *Stanley v. Georgia*, 394 U.S. 557, 89

S.Ct. 1243, 22 Lawyers Ed.2d 542 (1969). See also *Skinner v. Oklahoma, ex rel., Williamson*, 316 U.S. 535, 62 S.Ct. 1110, 86 Lawyers Ed. 1655 (1942); *Jacobson v. Massachusetts*, 197 U.S. 11, 29, 25 S.Ct. 358, 362, 49 Lawyers Ed. 643 (1905), 92 S.Ct. 1033, [footnotes omitted].

In addition to the problems of birth control decided in *Griswold*, *supra*, and *Eisenstadt*, *supra*, much litigation and legal scholarship have centered on the problems of others and their private sexual conduct. For example with respect to Sodomy, see *Hollis*, "Criminal Law—Sexual Offenses—Sodomy—Cunnilingus," 8 *Natural Resources J.* 531 (1968); *Johnson*, *Sodomy Statutes—A Need for Change*, 13 *S.D.L. Review*, 384 (1968); *Note*, *Sodomy—Crime or Sin?*, 12 *University Fla. Law Review*, 83 (1959), and also *Cotner v. Henry*, 394 F.2d 873 (1968); *Abortion*, *United States v. Vuitch*, 402 U.S. 62 (1972), and *State v. Barquet*, 262 So.2d 431 (Fla. 1972), and the cases cited therein, as well as *People v. Belous*, 80 Cal. Rptr. 354, 458 P.2d 194 (1969); *Homosexual Activities*, *Smayda v. United States*, 352 F.2d 251 (9th Cir. 1965). All of these cases have one common thread, like *Stanley*, *supra*, the question involved is a moral, not legal one.

Thus the basic question of the function of the law is raised. In the famous English Wolfenden Report of 1957, the authors concluded that:

It is not . . . the function of law to intervene in the private lives of citizens or to seek to enforce any particular pattern of behavior, Wolfenden Report at 9-10.

Moreover, it is the function of the courts, if they are to protect individual liberties from Governmental encroachment to independently evaluate data with reference to the society in which the courts function, c.f. Doss & Doss, "On Moral, Privacy and the Constitution," 25 Univ. Miami Law Review 395, 404 (1971). Thus the Report of the Commission on Obscenity and Pornography and its conclusions with respect to private acts between consenting adults becomes significant when tested by the right of privacy.

Amici contend that the right to buy, sell and commercially distribute and/or exhibit hard core pornography is as protected as the woman's right to choose to bear children, and to freely choose one's own sex partner, provided there is no pandering, intrusion, or juvenile involvement. What man, what justice, what court can tell another man what to read, view, or think about in the privacy of his own thoughts?

#### 4. FEDERAL AND STATE LEGISLATION WHICH SEEK TO PROHIBIT COMMERCIAL DISSEMINATION OF HARD CORE PORNOGRAPHY VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Amici contend that obscenity legislation has a discriminatory affect under the Fifth and Fourteenth Amendments to the United States Constitution for which neither the Federal nor various State Governments have a rational basis. It is elementary that the Fifth and Fourteenth Amendments' Equal Protection Clauses prohibit the Fed-

eral and State Governments from enacting legislation which unreasonably and/or arbitrarily discriminates against one identifiable group or individually in favor of another, *Reed v. Reed*, \_\_\_\_ U.S. \_\_\_\_, 92 S.Ct. 251 (1971).

This Court in *Stanley v. Georgia*, *supra*, gave protection to obscene materials found in the sanctity, (and privacy), of the home. The result of this case coupled with obscenity legislation against public exhibition and distribution gave to the rich man who could afford to purchase (even) obscene materials the right to view same in his home while the poor person was precluded entirely from such conduct. The less fortunate could neither afford the initial purchase nor in the case of movies the paraphernalia which are necessary for private exhibition. Thus the poor Stanley, who is denied the right to view this material at a movie theatre, or book store, is by operation of law being discriminated against contrary to the Fifth and Fourteenth Amendments see *U.S. v. Langford*, *supra*, and *U.S. v. Lethe*, *supra*.

This Court has most recently held in *Mayer v. Chicago*, \_\_\_\_ U.S. \_\_\_\_, 92 S.Ct. 410 (1971), that a transcript could not be denied in a criminal case where a fine was imposed merely because the defendant could not afford to pay for the transcript. This Court stressed:

**The invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed. (Emphasis added.)**

**C.f. Argeringer v. Hamlin**, U.S. Supreme Court Case No. 70-5015, \_\_\_\_ U.S. \_\_\_\_, 11 Cr.L. 3089 (June 12, 1972).

A similar situation arose in **Williams v. Illinois**, 399 U.S. 235 (1970), where this Court found an impermissible discrimination, resting on ability to pay, which existed when the aggregate imprisonment exceeds the maximum period fixed by statute and results directly from an involuntary nonpayment of a fine or court cost. See also **Boddie v. Connecticut**, 401 U.S. 371 (1971), Mr. Justice Douglas concurring, where indigents were denied equal protection of the laws in that they could not obtain divorces because of the expenses necessary to gain access to the courts.

Amici would further contend as emphasized above that a fundamental right is involved and thus both the Federal and State Governments must demonstrate an overriding and compelling interest to justify the discrimination. In **Skinner v. Oklahoma**, 316 U.S. 535 (1942), the court found marriage and procreation to be fundamental rights and further that the State showed no compelling State interest to justify sterilization of certain convicted felons and not others.

In **Shapiro v. Thompson**, 394 U.S. 618 (1968), this Court was faced with the constitutionality of waiting periods, i.e., residency requirements, for welfare recipients. This Court held:

Thus, even under traditional equal protection tests a classification of welfare applicants according to whether they have lived in the state for one year would seem irrational and unconsti-

tutional. But of course the traditional criteria do not apply in these cases. Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the strictest standard of whether it promotes a compelling State interest. Under this standard the waiting period requirement clearly violates the Equal Protection Clause.

Neither the Federal nor State Legislatures can show a compelling interest to justify why a poor person is deprived access to the same erotic material a rich man can easily view in the comfort of his own home. A review of *Stanley v. Georgia*, supra, and its background makes this proposition the next logical step.

— In *Stanley*, the United States Supreme Court specifically held that the First and Fourteenth Amendments protect private possession of obscene press materials. Thus, inherent in the right to possess is the right to receive. Said the Court in *Stanley*:

(3, 4) It is now well established that the Constitution protects the right to receive information and ideas. This freedom (of speech and press) . . . necessarily protects the right to receive . . . *Martin v. City of Struthers*, 319 U.S. 141, 148, 63 S.Ct. 862, 863, 87 L.Ed. 1813 (1943); see *Griswold v. Connecticut*, 381 U.S. 479, 482, 85 S.Ct. 1678, 1680, 14 L.Ed.2d 510 (1965); *Lamont v. Postmaster General*, 381 U.S. 301, 307-308, 85 S.Ct. 1493, 1496-1497, 14 L.Ed.2d 398 (1965) (Brennan, J., concurring); c.f. *Pierce v. Society of the Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed.

1070 (1925). This right to receive information and ideas, regardless of their socialworth, see *Winters v. New York*, 333 U.S. 507, 510, 68 S.Ct. 665, 667, 92 L.Ed. 840 (1948), is fundamental to our free society, 394 U.S. at 564.

It is interesting to note that in *Stanley* particular reliance is placed upon the opinions in *Martin v. City of Struthers*, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313, and *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510, two cases which emphasize the First Amendment right to receive all media of expression. In *Martin*, Mr. Justice Black, speaking for the Court, said:

The right of freedom of speech and press has broad scope. The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they choose to encourage a freedom which they believe essential if vigorous enlightenment was ever to triumph over slothful ignorance. This freedom embraces the right to distribute literature, . . . and necessarily protects the right to receive it. The privilege may not be withdrawn even if it creates the minor nuisance for a community of cleaning litter from its streets . . . Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved, 319 U.S. at 143, 146-147 [emphasis added].

In *Griswold v. Connecticut*, Mr. Justice Douglas, speaking for the Court, said:

... The State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read . . . and freedom to teach . . . indeed the freedom of the entire university community . . . without those peripheral rights the specific rights would be less secure, 381 U.S. 482, 483, [emphasis added].

In *Lamont v. Postmaster General*, quoting Justice Brennan's concurring opinion, 381 U.S. 301, 308 (1965) (which was cited in *Stanley*):

The right to receive publications . . . is a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren market place of ideas that had only sellers and no buyers.

The entire opinion and reasoning of the Supreme Court in *Stanley* take on the broader dimension of "mere private possession." It is true that the facts of *Stanley* involve a seizure of obscene materials from Stanley's bedroom but the language of the opinion clearly suggests that States have no business under the First and Fourteenth Amendments of the United States Constitution to

attempt to regulate the moral contents of a person's thoughts. This Court unequivocally held:

Whatever the power of the State to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts. . . . The State may no more prohibit mere possession of obscenity on the ground that it may lead to anti-social conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits. . . .

Finally we are faced with the argument that the prohibition of possession of obscenity is a necessary incident to statutory schemes prohibiting distribution . . . . we are not convinced that such difficulties exist, but even if they did we do not think that they would justify infringement of the individual's right to read or observe what he pleases. . . . We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime. Roth and the cases following that decision are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home, 394 U.S. at 566-568 (emphasis added).

Clearly, by its reliance upon cases involving distribution and receiving of expression, *Martin*, *Griswold*, *Lamont*, and others, *Stanley* also stands for the proposition that inherent in the right to possess is also the right to receive.

Several lower courts have already expressed the view *Amici press instanter*, for example, in *United States v. Lethe*, *supra*, that court held, "that a person has a constitutional right to buy or receive obscene material." 312 F.Supp. at 424. The court went on to state that:

The final step is not difficult. Can it be reasonably argued that although the government may not directly prevent someone from buying a book, it may achieve the same result indirectly by making it a crime to sell the book to him? I think not, unless the Government can demonstrate it has some substantial interest in preventing the sale other than keeping the purchaser from buying, 312 F.Supp. at 424.

Similarly *United States v. Langford*, *supra*, held that in the absence of *Redrup v. New York*, 386 U.S. 767 (1967) proscriptions, that even though materials are hard core pornography, "accepting the major premise in *Stanley v. Georgia* as the law, the logic of the *Lethe* case and the result it reaches seem unassailable," 315 F.Supp. at 194.

The Second Circuit Court of Appeals likewise has come to a similar conclusion in *United States v. Dellatia*, 438 F.2d 1252 (2d Cir. 1970). There appellant's conviction for a violation of 18 USC, Section 1461 was reversed based in large part on *Stanley v. Georgia*, *supra*, and the additional fact that the Government had failed to show a compelling interest, i.e., *Redrup* type conduct. Similarly the United States Court of Appeals for the District of Columbia has held in *Williams v. District of Columbia*, 419 F.2d 638 (CADC 1969), that:

"... That the State has no 'right to protect the individual's mind from the effects of obscenity' simply because it wishes 'to control the moral conduct and content of a person's thoughts.' This, the court said, would be inconsistent with the 'philosophy of the First Amendment,'" 419 F.2d at 645.

It would serve no useful purpose to supply additional cases of either Federal or State courts in which great reliance was placed on *Stanley v. Georgia*, supra. From the time *Stanley v. Georgia*, supra, was decided until this Court rendered its opinions on May 3, 1971, in both *United States v. Reidel*, 402 U.S. 351 (1971), and *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971), the natural assumption by legal scholars and judicial officers as well as exhibitors and disseminators of allegedly obscene material, was that the logical extension of *Stanley* would permit consenting adults in nonobtrusive circumstances to purchase and/or exhibit even hard core pornography. This Court, of course, foreclosed, apparently, this logical extension in holding that the use of the United States mails to distribute admittedly obscene materials was conduct which would be punished by appropriate criminal process, (*Reidel*); and further that the Tariff Act of 1930, Section 305(a), 19 USC, Section 1305(a) and related sections, were constitutional and did permit the seizure upon reentry into the United States' borders of admittedly obscene material, even though these materials were intended solely for private use, (*37 Photographs*). Amici contend of course that the issue of the right of the Federal Government to prohibit of in commerce in obscene material is separate and apart from the underlying philosophy and scope of *Stanley v. Georgia*. It seems clear

that in retrospect that both *Reidel*, supra, and *Thirty-Seven Photographs*, supra, fly in the face of *Stanley v. Georgia*, and the latter is far more consistent with both the historical and modern concept of the First Amendment, especially when tested by the Fifth and Fourteenth Amendments.

For this Court to hold otherwise would be to give to the citizens and residents of the United States an empty right under *Stanley v. Georgia*, supra. For, the right to receive in the privacy of one's own home, even hard core pornography, is meaningless unless one also has the collateral right to purchase such material. Obviously someone must have the right to sell or exhibit this material in order for *Stanley*, supra, to be available to the poor man as well as the rich.

D. IN THE ABSENCE OF EMPIRICAL DATA SUPPORTING THE ASSUMPTION THAT OBSCENE MATERIAL IS HARMFUL, THERE IS NO RATIONAL BASIS TO MAKE CRIMINAL THE BUYING, SELLING, RECEIVING, PUBLISHING, DISTRIBUTING, OR EXHIBITING OF SEXUALLY EROTIC MATERIALS TO ADULTS FOREWARNED OF ITS NATURE.

Law in any field, to be adequate and sound must rest on facts. It must grow out of experience. Thus research designed to make systematic investigations into human experience becomes indispensable to the healthy growth of the law. Erwin N. Griswald, Dean, Harvard Law School; Foreward in *Unraveling Juvenile Delinquency*, by Glueck, 1950.

The United States Congress found traffic in obscenity and pornography to be of national interest and further found that the Federal Government had a responsibility to investigate the gravity of the situation and to determine whether such materials are harmful to the public, and particularly to minors, and whether more effective methods should be devised to control the dissemination of such material. The Commission on Obscenity and Pornography was established by Public Law 90-100 (1967).

Ironically,

Before the findings of the commission were actually published, it was revealed that this body had drafted a report which was in direct contravention to what its sponsors believed such a commission would urge. **Censorship: For and Against**, Hart, pp. 7 (1971).

In, **The Report of the Commission on Obscenity and Pornography**, hereafter referred to as the **Report**, the Commission set forth the results of its study, and its various conclusions and recommendations, all of which were derived from the extensive socio-scientific study undertaken.

The focal point of the Commission's decision was that no social justification exists for the retention or enactment of broad legislation prohibiting the consensual distribution of sexual materials to adults and that the primary area of public concern was the thrusting of offensive materials upon unwilling recipients and the fear that these materials might be distributed to minors. The

Commission concluded that these two areas could be regulated effectively by legislative prohibitions, Report at 42-43.

The Commission's conclusion was based on several considerations, First:

Extensive empirical investigations, both by the Commission and by others, provides no evidence that exposure to or use of explicit sexual materials play a significant role in the causation of social or individual harms, such as crime, delinquency, sexual or non-sexual deviancy or severe emotional disturbances. Report at 52 (and 56).

One study for example showed that eighty (80) percent of the social-psychiatric clinicians consulted reported that they never encountered a case in which "pornography" appeared to be a factor in producing anti-social sexual behavior. The study also found that eighty-four (84) percent of the psychiatrists and psychologists disagreed with the statement "persons exposed to pornography are more likely to engage in antisocial sexual acts than person's not exposed," Report at 161. The Commission in fact added that analysis of the United States Crime rates do not support the thesis of a causal connection between the availability of erotica and sex crimes among either juveniles or adults and that studies showed that adult sex offenders are not significantly different from other adults in exposure or in reported arousal or reported likelihood of engaging in sociosexual behavior following exposure to erotica, Report at 242.

It should further be noted that the limited amount of information concerning the effects of sexually explicit materials on children was a factor which led the Commission however to be restrictive in the area of minors.

A second consideration upon which the Commission reached its conclusion was that public opinion in America did not support the imposition of legal prohibitions on the right of adults to read or see explicit sexual materials. The majority of the American people presently are of the view that adults should be legally able to read or see explicit sexual materials if they wish to do so, **Report at 43, 53.**

Further findings were the fact that studies showed that explicit sexual materials are sought as a source of entertainment and information by substantial numbers of American adults, society's attempts to legislate for adults in the area of obscenity have not been successful and are extremely unsatisfactory in their practical application; and the fact that expenditures of considerable law enforcement resources are involved where there appears no justification to support these expenditures, **Report at 52-53.**

Finally and of great importance to the Commission was:

The spirit and letter of our constitution tell us that government should not seek to interfere with these rights (press and speech) unless a clear threat of harm makes that course imperative. Moreover, the possibility of the misuse of

general obscenity statutes prohibiting distribution of books and films to adults constitute a continuing threat to the communication of ideas among Americans — one of the most important foundations of our liberties, **Report at 54.**

The Legal Panel of the Commission did an in depth and extremely comprehensive report of the legal history of obscenity decisions, **Report at 293-369.**

Of utmost importance is the Commission discussion of **Roth v. United States**, 354 U.S. 476 (1957), and subsequent cases. The Commission found that the **Roth**, *supra*, case held that prohibition upon the distribution of obscene material to consenting adults to be constituted without reliance upon authoritative findings or conclusions regarding the social effects of such material, **Report at 357.**

The Commission went on to say to 358:

Developments since the **Roth** decision have suggested both practical and constitutional doubts about appropriateness of its conclusion that distribution of "obscene" materials to consenting adults may constitutionally be broadly prohibited without reference to considerations of social harm. These developments have been in three areas: (a) The enormous practical difficulties under **Roth** of meaningfully defining what is "obscene" for consenting adults and of fairly applying such definitions in legal proceedings; (b) changing public opinion regarding the need for and the wisdom of prohibiting distribution

of sexual materials to consenting adults; (c) Developing constitutional doctrine holding that free expression guarantees apply to "obscene" materials in at least some adult contexts.

The Commission went on to discuss all of the above points and put special emphasis on the Constitutional issues stating; at 358-359:

The fundamental premise of **Roth** — that protections accorded to speech by the Constitution are wholly inapplicable to "obscene" material — was apparently rejected by the Supreme Court in 1969 in **Stanley v. Georgia**. There the court indicated that, even where material is "obscene", the individual citizen nevertheless has a constitutionally protected right, if he so wishes, to read or view such material at least in his own home. Obscenity prohibitions which interfere with this right appear to require the support of a sufficient governmental interest. The protection of juveniles from exposure to obscene materials and the protection of individual sensibilities against materials involuntary thrust upon persons who do not wish to see them were recognized in **Stanley** as legitimate governmental concerns. On the other hand, **Stanley** appears to have held that government may not rest prohibitions upon what consenting adults may read or view upon a desire to control their morality, or upon a desire to prevent crime or antisocial behavior, at least, in the absence of a solid empirical foundation. [Emphasis added.]

The areas where a rational basis for legislation prohibiting explicit sexual materials exists was stated in *Redrup v. New York*, 386 U.S. 767 (1967). These include situations where minors are involved, or where materials are thrust upon persons who do not wish to see them, or where pandering to non-consenting adults or juveniles has taken place. In fact it is these situations which the Commission felt should be regulated, Report at 56-62.

It is beyond question that both the State and Federal Governments must have a rational basis for enacting legislation, *Williams v. Lee Optical*, 348 U.S. 483 (1955); c.f. *Leary v. U. S.*, supra. No rational basis exists for having obscenity prohibition legislation where consenting adults are involved. This was clearly shown by the Report. The circumstances in *Buck v. Bell*, 274 U.S. 200 (1927), should be informative to this court in deciding the Constitutional issues involved instanter. In *Bell*, a Virginia statute allowed sterilization of feeble minded persons after very strict procedures were followed. This court found a rational basis for the statute as there was scientific evidence that such disease is hereditary. Instanter, no evidence can be adduced to show a rational basis for obscenity statutes relating to consenting adults as none exists. Thus, such legislation is truly in violation of the Fifth and Fourteenth Amendments.

To permit the First Amendment to be eroded without constitutional basis because of some unpopular sentiment toward the expression involved will result in the creation of numerous additional exceptions to that Amendment which will lead to the eventual destruction of this most important and time honored right.

**CONCLUSION**

Amici respectfully submit that this Court must hold that the First Amendment absolutely protects the right of a previously forewarned adult to buy, sell, receive, write, publish, distribute, disseminate and/or exhibit even hard core pornography and obscene material provided there is no assault or intrusion upon the sensibilities of other non-interested adults, no pandering, and no juvenile involvement. The Constitution of the United States, and the First Amendment thereto, stands as a bar against any limitation upon the right of adults to read or view sexually explicit material. The State and the Federal Governments' concern is properly limited to the dissemination of such material only where there is an assault or intrusion upon the sensibilities of other non-interested adults, pandering, or juvenile involvement.

Respectfully submitted,

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JOEL HIRSCHHORN,  
RALPH J. SCHWARZ, JR.,  
MEL S. FRIEDMAN,  
Amici Curiae.

# **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 6th day of October, 1972, copies of the above and foregoing were mailed, postage prepaid, to all attorneys of record; I FURTHER CERTIFY that all copies required to be served herein have been served.

**JOEL HIRSCHHORN,**  
**Amicus Curiae**

## APPENDIX

Office of the Solicitor General  
Washington, D.C. 20530

July 31, 1972

Joel Hirschhorn, Esq.  
1040 City National Bank Building  
Miami, Florida 33130

Re: United States v. 12, 200 Foot Reels of Super  
8 mm. Film, No. 70-2, October Term, 1972

Dear Mr. Hirschhorn,

In response to the request in your letter of July 28,  
I hereby consent to your filing a brief amicus curiae in  
the above-entitled case on behalf of the First Amendment  
Lawyers Association.

Very truly yours,

/s/ Erwin N. Griswold  
Solicitor General

App. 2

Law Offices

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August 1, 1972

Joel Hirschhorn, Esquire  
1040 City National Bank Building  
Miami, Florida 33130

RE: United States vs. 12, 200 Foot Reels of Super 8 mm  
Film U. S. Supreme Court Case No. 70-2

Dear Mr. Hirschhorn:

This responds to your letter of July 28, 1972, in which you request my permission to file an amicus curiae brief in the above-styled case.

You should be advised that I do not represent the claimant-appellee, who made no appearance in the Supreme Court. My participation, by invitation of the Court, was that of amicus curiae, in support of the judgment below. Accordingly, I do not believe that it is within my province either to grant or to withhold permission for others to file amicus curiae briefs. I suggest that you communicate with the Clerk of the Court on this question.

I should also advise you that the June 26, 1972 Order of Court restoring the case to the calendar for reargument did not specify that additional briefs were required or expected. I therefore suggest that you may also wish to inquire of the Clerk as to a possible schedule for filing of additional briefs.

Sincerely yours,

/s/ Thomas H. Kuchel  
of WYMAN, BAUTZER,  
ROTHMAN, & KUCHEL

K:M:t

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 300 U.S. 321, 327.

# SUPREME COURT OF THE UNITED STATES

## Syllabus

### UNITED STATES *v.* 12 200-FT. REELS OF SUPER 8MM. FILM ET AL. (PALADINI, CLAIMANT)

#### APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 70-2. Argued January 19, 1972—Reargued November 7, 1972—  
Decided June 21, 1973

Congress, which has broad powers under the Commerce Clause to prohibit importation into this country of contraband, may constitutionally proscribe the importation of obscene matter, notwithstanding that the material is for the importer's private, personal use and possession. Cf. *United States v. Orito*, *ante*, p. —. *Stanley v. Georgia*, 304 U. S. 557, distinguished. The District Court consequently erred in holding 19 U. S. C. § 1305 (a) unconstitutional. This case is remanded to the District Court for reconsideration in light of the First Amendment standards newly enunciated by this Court in *Müller v. California*, *ante*, p. —, which equally apply to federal legislation, and this opinion. Pp. 1-7.

Vacated and remanded.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion. BRENNAN, J., filed a dissenting opinion, in which STEWART and MARSHALL, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

# SUPREME COURT OF THE UNITED STATES

No. 70-2

United States, Appellant, } On Appeal from the United  
v. } States District Court for  
12 200-Ft. Reels of Super } the Central District of  
8mm. Film et al. } California.

[June 21, 1973]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court:

We noted probable jurisdiction to review a summary decision of the United States District Court for the Central District of California holding that 19 U. S. C. § 1305 (a) was "unconstitutional on its face" and dismissing a forfeiture action brought under that statute.<sup>1</sup> The statute provides in pertinent part:

"All persons are prohibited from importing into the United States from any foreign country . . . any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral . . . . No such articles whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the collector that the obscene or other prohibited articles contained in the package were inclosed therein without the knowledge or consent of the importer, owner,

<sup>1</sup> The United States brought this direct appeal under 28 U. S. C. § 1252. See *Clark v. Gabriel*, 393 U. S. 256, 258 (1968).

agent, or consignee, the entire contents of the package in which such articles are contained, shall be subject to seizure and forfeiture as hereinafter provided: . . . . *Provided, further,* That the Secretary of the Treasury may, in his discretion, admit the so-called classics or books of recognized and established literary or scientific merit, but may, in his discretion, admit such classics or books only when imported for noncommercial purposes."

On April 2, 1970, the claimant Paladini sought to carry movie films, color slides, photographs and other printed and graphic material into the United States from Mexico. The materials were seized as being obscene by customs officers at a port of entry, Los Angeles Airport, and made the subject of a forfeiture action under 19 U. S. C. § 1305 (a), *supra*. The District Court dismissed the Government's complaint, relying on the decision of the Three-Judge District Court decision in *United States v. Thirty-Seven Photographs*, 309 F. Supp. 36 (CD Cal. 1969), which we later reversed, 402 U. S. 363 (1971). That case concerned photographs concededly imported for commercial purposes. The narrow issue directly presented in this case, and not in *Thirty-Seven Photographs*, is whether the United States may constitutionally prohibit importation of obscene material which the importer claims is for private, personal use and possession only.<sup>2</sup>

Import restrictions and searches of persons or packages at the national borders rest on different considerations

<sup>2</sup> On the day the complaint was dismissed, claimant filed an affidavit with the District Court stating that none of the seized materials "were imported by me for any commercial purpose but were intended to be used and possessed by me personally." In conjunction with the Government's motion to stay the order of dismissal, denied below but granted by Mr. JUSTICE BRENNAN, the Government conceded it had no evidence to contradict claimant's affidavit and did not "contest the fact that this was a private importation."

and different rules of constitutional law from domestic regulations. The Constitution gives Congress broad, comprehensive powers "to regulate Commerce with foreign Nations." Article I, § 8. Historically such broad powers have been necessary to prevent smuggling and to prevent prohibited articles from entry. See *United States v. Thirty-Seven Photographs*, 402 U. S. 363, 376-377 (1971) (opinion of WHITE, J.); *Carroll v. United States*, 267 U. S. 132, 154 (1925); *Brolan v. United States*, 236 U. S. 216, 218 (1915); *Boyd v. United States*, 116 U. S. 616, 623-624 (1886); *Alexander v. United States*, 362 F. 2d 379, 382 (CA9 1966), cert. denied, 385 U. S. 977 (1966). The plenary power of Congress to regulate imports is illustrated in a holding of this Court which sustained the validity of an Act of Congress prohibiting the importation of "any film or other pictorial representation of any prize fight . . . designed to be used or may be used for purposes of public exhibition"<sup>2</sup> in view of "the complete power of Congress over foreign commerce and its authority to prohibit the introduction of foreign articles. . . . *Buttfield v. Stranahan*, 192 U. S. 470; *The Abby Dodge*, 223 U. S. 166, 176; *Brolan v. United States*, 236 U. S. 216." *Weber v. Freed*, 239 U. S. 325, 329 (1915).

Claimant relies on the First Amendment and our decision in *Stanley v. Georgia*, 394 U. S. 557 (1969). But it is now well-established that obscene material is not protected by the First Amendment. *Roth v. United States*, 354 U. S. 476, 485 (1957), reaffirmed today in *Miller v. California*, — U. S. — (p. 8) (1973). As we have noted in *United States v. Orito*, — U. S. — (pp. 2-4) (1973), also decided today, *Stanley* depended, not on any First Amendment right to purchase or possess obscene materials, but on the right to privacy in the

<sup>2</sup> Act of July 31, 1912, § 1, c. 263, 37 Stat. 240.

home. Three concurring Justices indicated that the case could have been disposed of on Fourth Amendment grounds without reference to the nature of the materials. *Stanley v. Georgia*, *supra*, 394 U. S., at 569 (1969) (concurring opinion of STEWART, J., joined by BRENNAN, J., and WHITE, J.).

In particular, claimant contends that, under *Stanley*, the right to possess obscene material in the privacy of the home creates a right to acquire it or import it from another country. This overlooks the explicitly narrow and precisely delineated privacy right on which *Stanley* rests. That holding reflects no more than what Mr. Justice Harlan characterized as the law's "solicitude to protect the privacies of the life within [the home]." *Poe v. Ullman*, 367 U. S. 497, 551 (1961) (dissenting opinion).<sup>4</sup> The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth or fifth "logical" extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance.<sup>5</sup> This kind of gestative propensity calls for the "line drawing" familiar in the judicial, as in the legislative process:

<sup>4</sup> Nor can claimant rely on any other sphere of constitutionally protected privacy, such as that which encompasses the intimate medical problems of family, marriage, and motherhood. See *Paris Adult Theatre I*, *supra*, — U. S., at — (pp. 15-17) (1973), and *United States v. Orito*, *supra*, — U. S., at — (p. 3-4) (1973).

<sup>5</sup> Mr. Justice Holmes had this kind of situation in mind when he said:

"All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached." *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 355 (1908).

"thus far but not beyond." Perspectives may change, but our conclusion is that *Stanley* represents such a line of demarcation; and it is not unreasonable to assume that had it not been so delineated, *Stanley* would not be the law today. See *United States v. Reidel*, *supra*, 402 U. S., at 354-356 (1971) (opinion of WHITE, J.); *id.*, at 357-360 (Harlan, J., concurring). See also *Miller v. United States*, 431 F. 2d 655, 657 (CA9 1970); *United States v. Fragus*, 428 F. 2d 1211, 1213 (CA5 1970); *United States v. Melvin*, 419 F. 2d 136, 139 (CA4 1969); *Gable v. Jenkins*, 309 F. Supp. 998, 1000-1001 (ND Ga. 1969), *aff'd*, 397 U. S. 592 (1970). Cf. *Karalexis v. Byrne*, 306 F. Supp. 1363, 1366 (D Mass. 1969), vacated on other grounds *sub nom. Byrne v. Karalexis*, 401 U. S. 216 (1971).

We are not disposed to extend the precise, carefully limited holding of *Stanley* to permit importation of admittedly obscene materials simply because they are imported for private use only. To allow such a claim would be not unlike compelling the Government to permit importation of prohibited or controlled drugs for private consumption as long as such drugs are not for public distribution or sale. We have already indicated that the protected right to possess obscene material in the privacy of one's home does not give rise to a correlative right to have someone sell or give it to others. *United States v. Thirty-Seven Photographs*, *supra*, 402 U. S., at 376 (1971) (opinion of WHITE, J.), and *United States v. Reidel*, 402 U. S. 351, 355 (1971). Nor is there any correlative right to transport obscene material in interstate commerce. *United States v. Orito*, — U. S. — (pp. 3-5) (1973).<sup>\*</sup> It follows that *Stanley* does not

<sup>\*</sup> In *Caminetti v. United States*, 242 U. S. 470 (1917), and *Hoke v. United States*, 227 U. S. 308 (1913), this Court upheld the "so-called White Slave Traffic Act, which was construed to punish any

permit one to go abroad and bring such material into the country for private purposes. "Stanley's emphasis was on the freedom of thought and mind in the privacy of the home. But a port of entry is not a traveler's home." *United States v. Thirty-Seven Photographs*, *supra*, 402 U. S., at 376 (1971) (opinion of WHITE, J.).

This is not to say that Congress could not allow an exemption for private use, with or without appropriate guarantees such as bonding, or to permit the transportation of obscene material under conditions insuring privacy. But Congress has not seen fit to do so, and the holding in *Roth v. United States*, *supra*, read with the narrow holding of *Stanley v. Georgia*, *supra*, does not afford a basis for respondent's claims. The Constitution does not compel, and Congress has not authorized, an exception for private use of obscene material. See *Paris Adult Theatre I v. Slaton*, *supra*, — U. S., at — (pp. 15-20 (1973); *United States v. Reidel*, *supra*, 402 U. S., at 357 (1971); *Memoirs v. Massachusetts*, 383 U. S. 413, 462 (1962) (WHITE, J., dissenting).

The attack on the overbreadth of the statute is thus foreclosed, but, independently, we should note that it would be extremely difficult to control the uses to which obscene materials were put once they entered this country. Even single copies, represented to be for personal use, could be quickly and cheaply duplicated by modern technology to enable wide-scale distribution. While it is true that a large volume of obscene material on microfilm could rather easily be smuggled into the United States by mail, or otherwise, and could be enlarged or

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person engaged in enticing a woman from one State to another for immoral ends, whether for commercial purposes or otherwise, . . . because it was intended to prevent the use of interstate commerce to facilitate prostitution or concubinage, and other forms of immorality." *Brooks v. United States*, 267 U. S. 432, 437 (1925) (emphasis added).

reproduced for commercial purposes, Congress is not precluded from barring some avenues of illegal importation because avenues exist that are more difficult to regulate. See *American Power & Light Co. v. Securities and Exchange Commission*, 329 U. S. 90, 99-100 (1946).

As this case came to us on the District Court's summary dismissal of the forfeiture action, no determination of the obscenity of the materials involved has been made. We have today arrived at standards for testing the constitutionality of state legislation regulating obscenity. See *Miller v. California, supra*, — U. S., at — (pp. 9-11) (1973). These standards are applicable to federal legislation.<sup>7</sup> The judgment of the District Court is vacated and the case is remanded for further proceedings consistent with this opinion, *Miller v. California, supra*, and *United States v. Orito, supra*, both decided today.

*Vacated and remanded for further proceedings.*

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<sup>7</sup> We further note that, while we must leave to state courts the construction of state legislation, we do have a duty to authoritatively construe federal statutes where "a serious doubt of constitutionality is raised . . ." and "a construction of the statute is fairly possible by which the question may be avoided." *United States v. Thirty-Seven Photographs*, 402 U. S. 363, 369 (1971) (opinion of WHITE, J.), quoting from *Crowell v. Benson*, 285 U. S. 22, 62 (1932). If and when such a "serious doubt" is raised as to the vagueness of the words "obscene," "lewd," "lascivious," "filthy," "indecent," or "immoral" as used to describe regulated material in 19 U. S. C. § 1305 (a) and 18 U. S. C. § 1462, see *United States v. Orito, supra*, — U. S., at — (p. 1) (1973), we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific "hard-core" sexual conduct given as examples in *Miller v. California, supra*, — U. S., at — (pp. 10-11) (1973). See *United States v. Thirty-Seven Photographs, supra*, 402 U. S., at 369-374 (1971) (opinion of WHITE, J.). Of course, Congress could always define other specific "hard-core" conduct.

# SUPREME COURT OF THE UNITED STATES

No. 70-2

United States, Appellant, | On Appeal from the United  
v. | States District Court for  
12 200-Ft. Reels of Super | the Central District of  
8mm. Film et al. | California.

[June 21, 1973]

MR. JUSTICE DOUGLAS, dissenting.

I know of no constitutional way by which a book, tract, paper, postcard, or film may be made contraband because of its contents. The Constitution never purported to give the Federal Government censorship or oversight over literature or artistic productions, save as they might be governed by the Patent and Copyright Clause of Art. I, § 8, cl. 8, of the Constitution.<sup>1</sup> To be sure, the Colonies had enacted statutes which limited the freedom of speech, see *Roth v. United States*, 354 U. S. 476, 482-484 nn. 10-13, and in the early 19th century the States punished obscene libel as a common law crime. *Knowles v. State*, 3 Conn. 103 (1808) (signs depicting "monster"); *Commonwealth v. Holmes*, 17 Mass. 336 (1821) (John Cleland's *Memoirs of a Woman of Pleasure*); *State v. Appling*, 25 Mo. 315 (1857) (utterance of words "too vulgar to be inserted in this opinion"); *Commonwealth v. Sharpless*, 2 Pa. 91 (1815) ("lewd, wicked, scandalous, infamous, and indecent posture with a woman").

To construe this history, as this Court does today in *Miller v. California*, ante, at —, as qualifying the

<sup>1</sup> Even the copyright power is limited by the freedoms secured by the First Amendment. *Lee v. Runge*, 404 U. S. 887, 892-893 (DOUGLAS, J., dissenting); Nimmer, Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?, 17 U. C. L. A. L. Rev. 1180 (1970).

plain import of the First Amendment is both a *non sequitur* and a disregard of the Tenth Amendment.

"[W]hatever may [have been] the form which the several States . . . adopted in making declarations in favor of particular rights," James Madison, the author of the First Amendment tells us, "the great object in view [was] to limit and qualify the powers of [the Federal] Government, by excepting out of the grant of power those cases in which the Government ought not to act, or to act only in a particular mode." 1 Annals of Congress 437. Surely no one should argue that the retention by the States of vestiges of established religions after the enactment of the Establishment and Free Exercise Clause saps these clauses of their meaning.<sup>2</sup> Yet it was precisely upon such reasoning that this Court, in *Roth*, exempted the bawdry from the protection of the First Amendment.

When it was enacted, the Bill of Rights applied only to the Federal Government, *Barron v. City of Baltimore*, 7 Pet. 243, and the Tenth Amendment reserved the residuum of power to the States and the people. That the States, at some later date, may have exercised this reserved power in the form of laws restricting expression in no wise detracts from the express prohibition of the First Amendment. Only when the Fourteenth Amendment was passed did it become even possible to argue that through it the First Amendment became applicable to the States. But that goal was not attained until the ruling of this Court in 1931 that the reach of the Fourteenth Amendment included the First Amendment. See *Stromberg v. California*, 283 U. S. 359, 368.

<sup>2</sup> Thus, the suggestion that most of the States that had ratified the Constitution punished blasphemy or profanity, is irrelevant to our inquiry here.

At the very beginning, however, the First Amendment applied only to the Federal Government and there is not the slightest evidence that the Framers intended to put the newly created federal regime into the role of ombudsman over literature. Tying censorship to the movement of literature or films in interstate commerce or into foreign commerce would have been an easy way for a government of delegated powers to impair the liberty of expression. It was to bar such suppression that we have the First Amendment. I dare say Jefferson and Madison would be appalled at what the Court espouses today.

The First Amendment was the product of a robust, not a prudish, age. The four decades prior to its enactment "saw the publication, virtually without molestation from any authority, of two classics of pornographic literature." D. Loth, *The Erotic in Literature* 108 (1961). In addition to William King's *The Toast*, there was John Cleland's *Fanny Hill* which has been described as the "most important work of genuine pornography that has been published in English . . . ." L. Markun, *Mrs. Grundy* 191 (1930). In England, *Harris' List of Covent Garden Ladies*, a catalog used by prostitutes to advertise their trade, enjoyed open circulation. N. St. John-Stevns, *Obscenity and the Law* 25 (1956). Bibliographies of pornographic literature list countless erotic works which were published in this time. See, e. g., A. Craig, *Suppressed Books* (1963); P. Fraxi, *Catena Liborum Tacendorum* (1885); W. Gallichan, *The Poison of Prudery* (1929); D. Loth, *The Erotic in Literature* (1961); L. Markun, *Mrs. Grundy* (1930). This was the age when Benjamin Franklin wrote his "Advice to a Young Man on Choosing a Mistress" and "A Letter to the Royal Academy at Brussels." "When the United States became a nation, none of the fathers of the country were any more concerned

than Franklin with the question of pornography. John Quincy Adams had a strongly puritanical bent for a man of his literary interests, and even he wrote of Tom Jones that it was 'one of the best novels in the language.'"<sup>3</sup> Loth, *supra*, at 120. It was in this milieu that Madison admonished against any "distinction between the freedom and licentiousness of the press." Padover, *The Complete Madison* 296 (1953). The Anthony Comstocks, the Thomas Bowdlers and the Victorian hypocrisy—the predecessors of our present obscenity laws—had yet to come upon the stage.<sup>4</sup>

Julius Goebel, our leading expert on colonial law, does not so much as allude to punishment of obscenity.<sup>5</sup> J. Goebel, *Development of Legal Institutions* (7th rev. 1946 ed.); J. Goebel, *Felony and Misdemeanor* (1937);

<sup>3</sup> Separating the worthwhile from the worthless has largely been a matter of individual taste because significant governmental sanctions against obscene literature are of relatively recent vintage, not having developed until the Victorian Age of the mid-19th century. N. St. John-Stevens, *Obscenity and the Law* 1-85 (1966). See 1 T. Emerson, *The System of Freedom of Expression* 468-469 (1970); J. Paul & M. Schwartz, *Federal Censorship* c. 1 (1961); Report of the Commission on Obscenity and Pornography 348-354 (1970). In this country, the first federal prohibition on obscenity was not until the Tariff Act of 1842, c. 270, § 28, 5 Stat. 566. England, which gave us the infamous Star Chamber and a history of licensing of publishing, did not raise a statutory bar to the importation of obscenity until 1853, Customs Consolidation Act, 16 & 17 Vict. c. 107, and waited until 1857 to enact a statute which banned obscene literature outright. Lord Campbell's Act, 20 & 21 Vict. c. 83.

<sup>4</sup> The only colonial statute mentioning the word "obscene" was Acts and Laws of the Province of Mass. Bay, c. CV, § 8 (1712), Mass. Bay Colony Charter & Laws 309 (1814). It did so, however, in the context of "composing, writing, printing or publishing . . . any filthy, obscene, or profane song, pamphlet, libel or mock sermon, in imitation or in mimicking of preaching, or any other part of divine worship" and must, therefore, be placed with the other colonial blasphemy laws. *E. g.*, Act for the Punishment of Divers Capital and Other Felonies, Acts and Laws of Conn. 66, 67 (1784); Act of 1723, c. 116, § 1, Digest of the Laws of Md. 92 (Herty 1799).

J. Goebel & T. Naughton, *Law Enforcement in Colonial New York* (1944).

Nor is there any basis in the legal history antedating the First Amendment for the creation of an obscenity exception. *Memoirs v. Massachusetts*, 383 U. S. 413, 424 (DOUGLAS, J., concurring). The first reported case involving obscene conduct was not until 1663. There, the defendant was fined for "shewing himself naked in a balkony, and throwing down bottles (pist in) vi & armis among the people in Covent Garden, contra pacem, and to the scandal of the Government." *Sir Charles Sydlves Case*, 83 Eng. Rep. 1146 (K. B. 1663). Rather than being a fountainhead for a body of law proscribing obscene literature, later courts viewed this case simply as an instance of assault, criminal breach of the peace, or indecent exposure. *E. g.*, *Brudlaugh v. Queen*, L. R. 3 Q. B. 569, 634 (1878); *Rez v. Curl*, 93 Eng. Rep. 849, 851 (K. B. 1727) (Fortescue, J., dissenting).

The advent of the printing press spurred censorship in England, but the ribald and the obscene were not, at first, within the scope of that which was officially banned. The censorship of the Star Chamber and the licensing of books under the Tudors and Stuarts was aimed at the blasphemous or heretical, the seditious or treasonous. At that date, the government made no effort to prohibit the dissemination of obscenity. Rather, obscene literature was considered to raise a moral question properly cognizable only by ecclesiastical, and not the common law, courts.\* "A crime that shakes religion, as profaneness on the stage, &c. is indictable; but writing an obscene book, as that intituled, 'The Fifteen Plagues of a Maiden-head,' is not indictable, but punishable only in the Spiritual Court." *Queen v. Read*, 88 Eng. Rep. 953 (K. B.

\* Lord Coke's *De Libellis Famosis*, 77 Eng. Rep. 250 (1606), for example, was the definitive statement of the common law of libel but made no mention of the misdemeanor of obscene libel.

1708). To be sure, *Read* was ultimately overruled and the crime of obscene libel established. *Rex v. Curl, supra*. It is noteworthy, however, that the only reported cases of obscene libel involved politically unpopular defendants. *Rex v. Curl, supra*; *Rex v. Wilkes*, 4 Burr. 2527 (K. B. 1770).

In any event, what we said in *Bridges v. California*, 314 U. S. 252, 264-265 (1941), would dispose of any argument that earlier restrictions on free expression should be read into the First Amendment:

"[T]o assume that English common law in this field became ours is to deny the generally accepted historical belief that 'one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press.' More specifically, it is to forget the environment in which the First Amendment was ratified. In presenting the proposals which were later embodied in the Bill of Rights, James Madison the leader in the preparation of the First Amendment said: 'Although I know whenever the great rights, the trial by jury, freedom of the press, or liberty of conscience, come in question in [Parliament], the invasion of them is restricted by able advocates, yet the Magna Charta does not contain any one provision for the security of those rights, respecting which the people of America are most alarmed. The freedom of the press and rights of conscience, those choicest privileges of the people, are unguarded in the British Constitution' "

This Court has nonetheless engrafted an exception upon the clear meaning of words written in the 18th century. But see *Bridges v. California, supra*, 264-265; *Grosjean v. American Press Co.*, 297 U. S. 233, 249.

Our efforts to define obscenity have not been productive of meaningful standards. What is "obscene" is

highly subjective, varying from judge to judge, from juryman to juryman.

"The fireside banter of Chaucer's Canterbury Pilgrims was disgusting obscenity to Victorian-type moralists whose co-ed granddaughters shock the Victorian-type moralists of today. Words that are obscene in England have not a hint of impropriety in the United States, and *vice versa*. The English language is full of innocent words and phrases with obscene ancestry." Brant, *The Bill of Rights* 490 (1965).

So speaks our leading First Amendment historian; and he went on to say that this Court's decisions "seemed to multiply standards instead of creating one." *Id.*, 491. The reason is not the inability or mediocrity of judges.

"What is the reason for this multiple sclerosis of the judicial faculty? It is due to the fact stated above, that obscenity is a matter of taste and social custom, not of fact." *Id.*, 491-492.

Taste and custom are part of it; but as I have said on other occasions,<sup>\*</sup> the neuroses of judges, lawmakers, and of the so-called "experts" who have taken the place of Anthony Comstock, also play a major role.

Finally, it is ironic to me that in this Nation many pages must be written and many hours spent to explain why a person who can read whatever he desires, *Stanley v. Georgia*, 394 U. S. 557, may without violating a law carry that literature in his brief case or bring it home from abroad. Unless there is that ancillary right, one's *Stanley* rights could be realized, as has been suggested, only if one wrote or designed a tract in his attic, printed or processed it in his basement, so as to be able to

<sup>\*</sup> *Ginsberg v. New York*, 390 U. S. 629, 661-671 (dissenting).

read it in his study. *United States v. Thirty Seven Photographs*, 402 U. S. 363, 382 (Black, J., dissenting).

Most of the items that come this way denounced as "obscene" are in my view trash. I would find few, if any, that had by my standards any redeeming social value. But what may be trash to me may be prized by others.<sup>1</sup> Moreover, by what right under the Constitution do five of us have to impose our set of values on the literature of the day? There is danger in that course, the danger of bending the popular mind to new norms of conformity. There is, of course, also danger in tolerance, for tolerance often leads to robust or even ribald productions. Yet that is part of the risk of the First Amendment.

Irving Brant summed the matter up:

"Blessed with a form of government that requires universal liberty of thought and expression, blessed with a social and economic system built on that same foundation, the American people have created the danger they fear by denying to themselves the liberties they cherish." *Op. cit. supra*, at 493.

<sup>1</sup> *Ginsburg v. United States*, 388 U. S. 463, 491.

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# SUPREME COURT OF THE UNITED STATES

No. 70-2

United States, Appellant, } On Appeal from the United  
v. } States District Court for  
12 200-Ft. Reels of Super } the Central District of  
8mm. Film et al. } California.

[June 21, 1973]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

We noted probable jurisdiction to consider the constitutionality of 19 U. S. C. § 1305 (a) which prohibits all persons from "importing into the United States from any foreign country . . . any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral." Pursuant to that provision, customs authorities at Los Angeles seized certain movie films, color slides, photographs, and other materials, which appellee sought to import into the United States. A complaint was filed in the United States District Court for the Central District of California for forfeiture of these items as obscene. Relying on the decision in *United States v. 37 Photographs*, 309 F. Supp. 36 (CD Cal. 1969), which held the statute unconstitutional on its face, the District Court dismissed the complaint. Although we subsequently reversed the decision in *United States v. 37 Photographs*, 402 U. S. 363 (1971), the reasoning that led us to uphold the statute is no longer viable, under the view expressed in my dissent today in *Paris Adult Theatre v. Slaton*, ante. Whatever the extent of the Federal Government's power

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to bar the distribution of allegedly obscene material to juveniles or the offensive exposure of such material to unconsenting adults, the statute before us is, in my view, clearly overbroad and unconstitutional on its face. See my dissent in *Miller v. California*, ante. I would therefore affirm the judgment of the District Court.